LIBRARY
SUPREME COURT, U. S.

FILED
DEC 19 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 72-1628

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, A JOINT VENTURE, JACK CHERTOK TELEVISION, INC. AND DENA PICTURES, INCORPORATED,
Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

ARA D. SOKOLOW
SYDNEY M. KAYE
PHILIP MANDELKER
575 Madison Avenue
New York, New York 10022

HARRY R. OLSSON, JR.
51 W. 52 Street
New York, New York 10022
Attorneys for Respondent Columbia Broadcasting System, Inc.

CHARLES H. MILLER
ROYAL E. BLAKEMAN
BERTRAND H. WEIDBERG
430 Park Avenue
New York, New York 10022
Attorneys for Respondent Calvada Productions

EUGENE Z. DUBOSE
ALFRED C. MORAN
120 Broadway
New York, New York 10005
Attorneys for Respondent Jack Chertok Television, Inc.

SEYMOUR GRAUBARD
BERNARD BUCHHOLZ
345 Park Avenue
New York, New York 10022
Attorneys for Respondent Dena Pictures, Incorporated

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	4
A. Prior Proceedings Herein	4
B. Decisions Below	8
C. The Pertinent Facts	11
1. Teleprompter's Farmington, New Mexico Cable Television Station	12
2. Teleprompter's Great Falls, Montana Cable Television Station	14
3. Teleprompter's Rawlins, Wyoming Cable Television Station	15
4. Teleprompter's Elmira, New York Cable Television Station	16
SUMMARY OF ARGUMENT	17
ARGUMENT	18
I. TELEPROMPTER'S IMPORTATION AND DISTRIBUTION OF DISTANT SIGNALS IS A PERFORMANCE WITHIN THE MEANING OF THE COPYRIGHT ACT OF 1909	18
A. The purpose of the Copyright Act of 1909 is to grant statutorily protected rights of public performance to copyright proprietors in order to serve the public interest by rewarding the creators of copyrighted works by payment for these rights	18
B. Under all relevant pre-*Fortnightly* decisions, Teleprompter's activities in importing distant signals constitute a performance of the programs embodied in those signals	22

PAGE

C. Under the test set down by this Court in *Fortnightly*, Teleprompter's activities in importing distant signals constitute a performance of the programs embodied by those signals 26

1. The *Fortnightly* case established only a limited copyright immunity 26

2. Importation of distant signals is a function that falls on the broadcaster's-performer's "side of the line" and is not that of a "passive beneficiary" 36

(a) The concept that there is a difference between "local" and "distant" broadcasting signals is well established and recognized 36

(b) Under the *Fortnightly* test Teleprompter's cable television stations when they import "distant signals" fall on the broadcaster's "side of the line" and are subject to copyright liability 40

D. Application of the *Fortnightly* doctrine in the manner urged by Teleprompter, so as to grant copyright immunity to cable television stations importing distant signals, would destroy existing licensing relationships between copyright proprietors and the broadcasting industry and violate well-established copyright principles, a result abjured by this Court in *Fortnightly* 44

PAGE

II. TELEPROMPTER'S NON-COPYRIGHT ARGUMENTS IN SUPPORT OF A REVERSAL OF THE DECISION OF THE COURT OF APPEALS BELOW ARE IRRELEVANT AND UNFOUNDED 48

A. Neither the Communications Act nor FCC regulations can amend or interpret the Copyright Act 49

B. Teleprompter's economic argument, based on a mis-use of the term "Coverage Area" of broadcasting stations, is strained and incorrect 53

C. Teleprompter's "license implied-in-law" argument, even recast as a "dedicated to the public" argument, has no basis in law and has been repeatedly rejected by the courts .. 61

D. The rule of the Court of Appeals below does not threaten the viability of cable television 65

CONCLUSION 72

TABLE OF AUTHORITIES

PAGE

CASES:

Adams v. *Burke*, 84 U. S. (17 Wall.) 453 (1873) .. 63

Allen v. *State Board of Elections*, 393 U. S. 544 (1969) 71

Aro Mfg. Co. v. *Convertible Top Replacement Co.*, 377 U. S. 476 (1964) 63

Associated Music Publishers, Inc. v. *Debs Memorial Radio Fund, Inc.*, 141 F. 2d 852 (2d Cir.), *cert. denied*, 323 U. S. 766 (1944) 23, 29

Bobbs-Merrill Co. v. *Staus*, 210 U. S. 339 (1908) 63, 64

Buck v. *Debaum*, 40 F. 2d 734 (S. D. Cal. 1929) 34, 35, 63

Buck v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931) 23, 26, 48, 63

Cable Vision, Inc. v. *KUTV, Inc.*, 335 F. 2d 348 (9th Cir. 1964), *cert. denied*, 379 U. S. 989 (1965) 50, 51

Chevron Oil Co. v. *Huson*, 404 U. S. 97 (1971) ... 71

Cipriano v. *City of Houma*, 395 U. S. 701 (1969) .. 71

Davis v. *E. I. DuPont de Nemours & Co.*, 249 F. Supp. 329 (S. D. N. Y. 1966) 26, 65

Davis v. *E. I. DuPont de Nemours & Co.*, 240 F. Supp. 612 (S. D. N. Y. 1965) 23

Dorchester Music Corp. v. *National Broadcasting Co.*, 171 F. Supp. 580 (S. D. Cal. 1959) 23, 26

England v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964) 71

Farmers Union v. *WDAY*, 360 U. S. 525 (1959) . 51

FCC v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940) 50

Ferris v. *Frohman*, 223 U. S. 424 (1912) 64

PAGE

Fortnightly Corp. v. *United Artists Television Corp.*, 392 U. S. 390 (1968) ..... *passim*
Fox Film Corporation v. *Doyal*, 286 U. S. 123 (1932) 19, 20, 22
Goldsmith v. *Commissioner of Internal Revenue*, 143 F. 2d 466 (2d Cir.), *cert. denied*, 323 U. S. 774 (1944) 21
Great Northern Railway v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932) 71
Harms, Inc. v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E. D. Pa. 1958), *aff'd sub. nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959) 23, 24
Herbert v. *Shanley Co.*, 242 U. S. 591 (1917) 47
Herwig v. *United States*, 105 F. Supp. 384 (1952) 22
Interstate Circuit, Inc. v. *United States*, 306 U. S. 208 (1939) 22
Jerome H. Remick & Co. v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925) 23, 24, 29, 48
Jerome H. Remick & Co. v. *General Electric Co.*, 16 F. 2d 829 (S. D. N. Y. 1926) 23, 34, 35, 36
Kalem Co. v. *Harper Bros.*, 222 U. S. 55 (1911) ... 24
King v. *Mister Maestro, Inc.*, 224 F. Supp. 101 (S. D. N. Y. 1963) 64
Law v. *National Broadcasting Co.*, 51 F. Supp. 798 (S. D. N. Y. 1943) 23, 26, 65
M. Witmark & Sons v. *L. Bamberger & Co.*, 291 Fed. 776 (D. N. J. 1923) 23, 47, 48
Manners v. *Morosco*, 252 U. S. 317 (1919) 22, 64
Mazer v. *Stein*, 347 U. S. 201 (1954) 20, 21, 47
Metro-Goldwyn-Mayer Dist. Corp. v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932) 23
Robertson v. *Batten, Barton, Durstine & Osborn, Inc.*, 146 F. Supp. 795 (S. D. Cal. 1956) 23

PAGE

Select Theatres Corp. v. *Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y. 1943) 23, 24, 25, 29, 36, 65

Shapiro, Bernstein & Co., Inc. v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236 (9th Cir. 1966) 70

Society of European Stage Authors and Composers, Inc. v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S. D. N. Y. 1937) 23

Tiffany Prods., Inc. v. *Dewing*, 50 F. 2d 911 (D. Md. 1931) 23

United Artists Television, Inc. v. *Fortnightly Corp.*, 377 F. 2d 872 (2d Cir. 1967), *rev'd*, 392 U. S. 390 (1968) 6, 22, 27, 28, 61

United Artists Television, Inc. v. *Fortnightly Corp.*, 255 F. Supp. 177 (S. D. N. Y. 1966), *aff'd*, 377 F. 2d 872 (2d Cir. 1967), *rev'd*, 392 U. S. 390 (1968) 5, 6

United States v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948) 21

United States v. *Southwestern Cable Co.*, 392 U. S. 157 (1968) 9, 34, 58, 59

Uproar Co. v. *NBC*, 8 F. Supp. 348 (D. Mass. 1934), *aff'd*, 81 F. 2d 373 (1st Cir.), *cert. denied*, 298 U. S. 670 (1930) 64

Walt Disney Prod'ns v. *Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W. D. Wash. 1969) ..23, 42

Washington Publishing Co. v. *Pearson*, 306 U. S. 30 (1939) 47

Woolworth Co. v. *Contemporary Arts*, 344 U. S. 228 (1952) 70

CONSTITUTION, STATUTES, RULES:

United States Constitution:

Art. 1, Section 8, Clause 8 .....18, 19, 50

PAGE

Communications Act of 1934:
47 U. S. C. § 153(o) 64
47 U. S. C. § 303(b) 58
47 U. S. C. § 303(c) 38
47 U. S. C. § 303(d) 38
47 U. S. C. § 303(h) 38, 58
47 U. S. C. § 303(s) 58
47 U. S. C. § 325(a) 13
47 U. S. C. § 414 .....50, 64

Copyright Act of 1909:
17 U. S. C. § 1(c), (d) ...3, 18, 19, 23, 24, 28, 48, 50
17 U. S. C. § 1(e) 23
U. S. Supreme Court Rule 36 1

Rules of the Federal Communications Commission:
47 C. F. R. § 21.713 43
47 C. F. R. § 73.684 32
47 C. F. R. § 76.51-65 51
47 C. F. R. § 76.51 57
47 C. F. R. § 76.54 69
47 C. F. R. § 76.54(a) 57
47 C. F. R. § 76.57 69
47 C. F. R. § 76.59 69
47 C. F. R. § 76.61 69
47 C. F. R. § 76.91-159 51

PAGE

REPORTS AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION:

Sixth Report and Order, 17 Fed. Reg. 3905 (1952) 39

First Report and Order on Microwave Served CATV, 38 FCC 683 (1965) 39, 59

Second Report and Order on Community Antenna Television Systems, 2 FCC 2d 725 (1966) ..39, 51, 58, 59

Notice of Proposed Rule Making and Notice of Inquiry, 15 FCC 2d 417 (1968) 57, 58, 60

Further Notice of Proposed Rulemaking (Cable Television Docket), 27 FCC 2d 13 (1971) ... 53

"Ascertainment of Community Problems by Broadcast Applicants," 27 FCC 2d 650 (1971) 38

Cable Television Report and Order, 36 FCC 2d 143 (1972) 39, 51, 52, 57, 58, 69

Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, 36 FCC 2d 326 (1972) 57

CONGRESSIONAL:

66 Stat. 752 29

Bills:

H. R. 4347, 89th Cong., 2d Sess. (1966) 65

H. R. 2512, 90th Cong., 1st Sess. (1967) 65

S. 3008, 88th Cong., 2d Sess. (1964) 65

S. 543, 91st Cong., 1st Sess. (1969) 65

S. 644, 92nd Cong., 1st Sess. (1971) 65

S. 1361, 93rd Cong., 1st Sess. (1973) 65

PAGE

TEXTS:

Milgrim, "Territoriality of Copyright: An Analysis of Assignability Under the Universal Copyright Convention," 12 *ASCAP Copyright Law Symposium* 1 (1963) 22

Nimmer, *Copyright Publication*, 56 Colum. L. Rev. 185 (1956) 64

MISCELLANEOUS:

Broadcasting, March 12, 1973 70

Cable News, March 12, 1973 70

CATV-Newsweekly of Cable Television, March 19, 1973 70

CATV-Newsweekly of Cable Television, Nov. 19, 1973 5

CATV-Newsweekly of Cable Television, Nov. 26, 1973 .....27, 39, 60

Comments of the NCTA, In the Matter of *Various Methods of Transmitting Program Material to Hotels and Similar Locations, et al.*, FCC Dkt. No. 19671 *et al.* (May 21, 1973) 60

Comments of Teleprompter Corp., In the Matter of *Various Methods of Transmitting Program Material to Hotels and Similar Locations, et al.*, FCC Dkt. No. 19671 *et al.* (May 21, 1973) 60

Complaint in *Teleprompter Cable Services, Inc.* v. *American Microwave and Communications Corp.*, FCC Dkt. No. 72-643 (complaint filed May 25, 1972) 47

Complaint in *Teleprompter Corp.* v. *Lake Superior Cablevision Ltd.*, File No. M42-72 CA3 (W. D. Mich., complaint filed June 5, 1972) 46

D. Burch, Letter to Congress dated August 5, 1971 52

PAGE

D. Burch, Address to the National Cable Television Association, June 19, 1973 53

D. Burch, Address to the U. K. Standing Conference on Broadcasting, November 17, 1973 ..27, 38, 39, 60

Johnson, Leland, The Future of Cable Television (Rand Corp. Rpt. 1970) 68

Memorandum for the United States as *Amicus Curiae* to the Supreme Court in *Fortnightly Corp.* v. *United Artists Television, Inc.* 62, 63

Petitioner's Reply Brief to the Supreme Court in *Fortnightly Corp.* v. *United Artists Television, Inc.*, March 5, 1968 .....31, 32

Petition for Rule-making filed by NCTA in the Matter of *Amendment of Subpart F. of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Systems* (Nov. 9, 1973) 51, 52

Television Factbook, vol. 38 (1968-1969 Ed.) 56

Television Factbook, vol. 41 (1971-1972 Ed.)....12, 43

Television Factbook, vol. 42 (1972-1973 Ed.) 56

Television Factbook, vol. 43 (1973-1974 Ed.) 5, 72

U. S. Industrial Outlook 1974 (Oct. 1973) 5

Webster's Third International Dictionary, 1961 ... 40

IN THE

Supreme Court of the United States

October Term 1973

No. 72-1628

TELEPROMPTER CORPORATION and
CONLEY ELECTRONICS CORPORATION,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES INCORPORATED,
Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (A. xvi-xliii)* is reported at 476 F. 2d 338 (2d Cir. 1973). The opinion of

*"A" references are to the Appendix filed by the parties pursuant to Rule 36 of this Court's Rules. "E" references are to the Exhibit Volume.

The various briefs already filed in this docket and the companion docket 72-1633 by the parties and *amici* will be referred to as follows: Teleprompter's brief as Petitioner in 72-1628 as "Pet. Br."; National Cable Television Association's (hereinafter "NCTA") brief *amicus* (cont'd)

the District Court (A. 103a-142a) is reported at 355 F. Supp. 618 (S. D. N. Y. 1972).

QUESTION PRESENTED

The only question really presented by petitioners is:

Do petitioners' cable television stations which (1) deliberately select for importation various television signals from distant markets, (2) take and import these distant signals into the communities in which they operate, and (3) transmit these signals to their paying subscribers over their cable stations, "perform" the copyrighted material embodied in such signals under Section 1(c) and (d) of the Copyright Act of 1909, 17 U. S. C. § 1(c) and (d)?

Petitioners Teleprompter Corporation and Conley Electronics Corporation (hereinafter "Teleprompter") set forth three further questions as issues in their petition. None of these bears any relation to the opinion of the Court of Appeals below or to the issues posed by this case. See *infra* at 48-72.[1]

---

in 72-1628 as "NCTA Br."; Consumers Union's brief *amicus* in 72-1628 and 72-1633 as "C. U. Br."; American Society of Composers, Authors and Publishers' brief *amicus* in 72-1633 as "ASCAP Br."; the Columbia Broadcasting System, Inc. (hereinafter "CBS"), Calvada, Chertok and Dena (hereinafter "Respondents") brief as Petitioners in 72-1633 as "Cross-Pet. Br." The brief *amicus* filed in 72-1628 by the Motion Picture Association of America, *et al.* is referred to as "MPAA Br."; the brief *amicus* filed in 72-1628 by the Writers Guild of America, *et al.* as "Guild Br."; and the brief *amicus* filed by the Author's League of America, Inc. 72-1628 as "League Br.".

[1]Certain other issues that are posed by the Court of Appeals' decision in this case have been presented to this Court in Dkt. No. 72-1633, which has been consolidated with the issue presented by this Docket. The issues involved in Dkt. No. 72-1633 involve the copyright effect of the performance by cable television stations of certain functions traditionally associated with the broadcast industry, *i.e.* origination of programming, sale of commercials, and interconnection into networks.

Since the parties are filing separate briefs with respect to the two dockets here involved, this Court is referred to the Brief for Peti- (cont'd)

STATUTE INVOLVED

The only relevant statutory provision involved herein is Section 1(c) and (d) of the Copyright Act, 17 U. S. C. § 1(c) and (d), which provides:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (c) to deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever * * * and
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, pro-

tioners in Dkt. No. 72-1633 for a full discussion of these other issues and a full statement of the facts relating to them. Given the fact, however, that Respondents herein desire to present to the Court a self-contained brief with respect to the issues involved in this Dkt. No. 72-1628, some repetition in the factual statement, the discussion of the legal precedents, and the argument is necessary.

duce, or reproduce it in any manner or by any method whatsoever * * *."

STATEMENT

A. Prior Proceedings Herein.

This is an action for copyright infringement commenced on December 11, 1964 and supplemented by complaints filed on December 15, 1969 and May 17, 1971 (A. 1a-28a, 50a-59a, 87a-93a). The plaintiffs below (Respondents herein) are four separate copyright proprietors. Respondents Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures, Incorporated are independent creators and producers of television programs which are protected by statutory copyright. Respondent CBS, the operator of a television network, sues in its capacity as a creator, producer, and licensee of television programs protected by statutory copyright.

The copyrighted programs here at issue were initially licensed for transmission by the CBS Television Network, a Division of CBS, to its affiliated television stations for simultaneous broadcast by those stations to viewers in their respective service areas ("network programs"). Some of the copyrighted works described in the complaints were subsequently "syndicated," *i.e.* licensed by the copyright owners or their licensed distributors to individual television stations, having no relation to the network on which the programs were originally run, for further broadcast to viewers in their service areas. Certain of the infringements at issue here occurred during the initial network "run" of the programs, others during their syndication.[2]

---

[2]Network programs involved here include three programs created, copyrighted and distributed by CBS itself (A. 4a-9a). They also include programs licensed for network distribution by independent producers—respondents Calvada, Chertok and Dena—who created (cont'd)

Teleprompter is the nation's largest operator of cable television stations. At the time of trial, it owned and operated some 100 cable television stations throughout the country with more than 500,000 paying subscribers. Its stations (more than 140) are presently serving some 900,000 subscribers.[3]

The complaints alleged that the Teleprompter cable television stations, by intercepting the signals of television stations broadcasting Respondents' copyrighted works and then retransmitting them to their paying subscribers without authorization or license, had performed the copyrighted works and infringed Respondents' copyrights.

At the time of the filing of the original complaint there was pending in the United States District Court for the Southern District of New York the case of *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177 (S. D. N. Y. 1966), *aff'd*, 377 F. 2d 872 (2d Cir. 1967), *rev'd*, 392 U. S. 390 (1968) (hereinafter "*Fortnightly*"). *Fortnightly* was a case of first impression designed to test the copyright liability of traditional CATV systems, the

---

and copyrighted the programs (A. 9a-13a, 15a-19a, 21a-24a). Two other network programs involved were created and copyrighted by a non-party to this action, which assigned all its rights in the programs to CBS which then distributed them (A. 50a-52a, 87a-89a).

Three programs involved in this action were in syndication at the time of alleged infringement (A. 52a-56a, 89a-93a). In one instance the program in syndication was broadcast by a television station affiliated with the NBC network (KHQ-TV, Spokane, A. 52a-54a), in another an ABC affiliate (KBTV, Denver, A. 54a-56a), and in the third by an independent television station (KTTV, Los Angeles, A. 91a-93a). The significance of syndicated programs in this case is discussed at length *infra* at 45-48.

[3] *CATV-Newsweekly of Cable Television*, Nov. 19, 1973 at p. 3. In January 1973, there were some 3,032 cable television stations serving more than 6,000 communities. TELEVISION FACTBOOK, Services Vol. 43 (1973-1974 Ed.) at pp. 84a, 379a. The Department of Commerce in its U. S. INDUSTRIAL OUTLOOK 1974 (Oct. 1973) at p. 288 predicts that at the end of 1973 cable television will have some 8.2 million subscribers nationally.

function of which was to merely enhance the reception by television viewers of the signals of nearby television stations. Respondents herein were not parties to that action.

The District Court in *Fortnightly* found that the CATV systems described therein infringed the copyrights at issue, basing its decision in large part upon its analysis of the technical and engineering aspects of the defendant's systems. 392 U. S. at 399 n. 27. On appeal, the Second Circuit unanimously affirmed the finding of infringement, basing its decision largely on the quantitative contributions which the Fortnightly systems made to bring about the viewing of the copyrighted works. *Id.* at 396-397.[4]

This Court reversed, holding *inter alia* that the issue of copyright infringement depended upon "a determination of the function" that a particular cable television system plays "in the total process of television broadcasting and reception." *Id.* at 397. This Court characterized Fortnightly's overall function as that of a mere reception service —a "passive beneficiary"—and determined that the Fortnightly CATV systems were "on the viewer's side of the line" and thus did not infringe. *Id.* at 399.[5]

After *Fortnightly*, pre-trial proceedings resumed in this case. The bulk of the basic facts pertaining to the function of the Teleprompter systems was stipulated by the parties (A. 148a-291a). These stipulations established that the Teleprompter cable television stations performed significant functions which were not performed by the Fortnightly systems.

By pre-trial order dated October 23, 1970, the trial of this case was divided into separate stages. The first stage,

---

[4]While *Fortnightly* was on appeal, counsel for the parties in this case voluntarily stayed proceedings herein in order to avoid an unnecessary burden on the courts.

[5]For a more detailed discussion of *Fortnightly* see *infra* at 26-36.

on appeal here, was concerned solely with the issue of whether or not there had been an infringement of Respondents' copyrights and whether there was a "license implied-in-law" for Teleprompter's activities. The issue of damages, should infringement be established, as well as Teleprompter's detailed "antitrust" defenses were segregated for consideration at a subsequent stage if such became necessary (A. 71a-80a, 101a).[6]

Upon completion of the first trial stage, the courts below found that the Teleprompter cable television stations: selected and imported for retransmission to their paying subscribers programs broadcast in the first instance by television stations in markets far distant from and in no way related to the communities in which petitioners' cable television stations operated; originated substantial programming; sold advertising; interconnected with other cable television stations; and transmitted television signals over-the-air. These functions—traditionally functions of broadcasters and not present in *Fortnightly*—were in addition to a so-called "reception service" which in some areas enhanced the ability of subscribers to receive the available broadcast signals of television stations in local and adjacent markets (A. xx-xxv, xxx, xxxi, 476 F. 2d at 343-345, 348; A. 111a-121a, 355 F. Supp. at 621-624). The courts below also found that the various services were sold by the Teleprompter stations to their paying subscribers "as a package," and that no one

---

[6]To facilitate the resolution of the basic legal issues, it was assumed by the parties below that: (i) Respondents owned the copyrights involved in the suit; (ii) these copyrights were valid; (iii) the copyrighted works were in fact transmitted to and broadcast by the television stations, as alleged in the complaints, and that these broadcasts were licensed and/or authorized by the copyright owners; and (iv) without license or authorization from the copyright owners the Teleprompter cable stations had in fact, as alleged in the complaints, received those copyrighted works off-the-air and retransmitted them to their paying subscribers (A. 71a-72a).

of their services was available independent of the others (A. xxviii, 476 F. 2d at 347; A. 121a, 135a, 355 F. Supp. at 624, 629).

The basic legal issue presented below was whether cable television stations performing all or some of these admittedly new functions could be termed "passive beneficiaries" or "on the viewer's side of the line" for purposes of copyright liability within the meaning of *Fortnightly*. 392 U. S. at 396-399.

B. Decisions Below.

The District Court held that *Fortnightly* was not dispositive of the issues before it. The court noted that "[p]rogress in the CATV industry" and certain novel and "specific differences between defendants' CATVs and those in Fortnightly" made this case "the inevitable sequel to [Fortnightly]." (A. 105a, 355 F. Supp. at 619.) But notwithstanding this conclusion, the District Court held itself bound by *Fortnightly* to dismiss the complaints (A. 138a-139a, 355 F. Supp. at 630), thus granting the entire cable television industry copyright immunity by judicial fiat.

The Court of Appeals also recognized that the operations of the cable stations in this case were "different and broader" than those before this Court in *Fortnightly* (A. xxvi, 476 F. 2d at 346). In an unanimous opinion, the Second Circuit set forth the issue before it as:

> "whether the character of CATV is so changed by the additional services that the cable systems here have undertaken that their total operation, including the reception service, under the *Fortnightly* functional test, have become functionally equivalent to those of a broadcaster, and thus these systems should be deemed to 'perform' the broadcast programming that they distribute." (A. at xxvii, 476 F. 2d at 346.)

The analysis of the Court of Appeals led it properly to reverse the judgment of the District Court with respect to Teleprompter's activities in selection, importation and distribution of television signals embodying Respondents' copyrighted works from "distant" broadcast stations located at great distances, in some cases hundreds of miles, from the communities served by the Teleprompter cable television stations and clearly beyond the service areas of those stations—functions admittedly not before the Supreme Court in *Fortnightly*. See *infra* at 31. The Second Circuit held that cable television stations to the extent that they import such "distant" signals are "functionally equivalent to a broadcaster and thus should be deemed to 'perform' the programming distributed to subscribers on these imported signals" within the meaning of *Fortnightly* and of the Copyright Act (A. xxxiii, 476 F. 2d at 349).[6a]

The court below did not treat *Fortnightly* as having given a total copyright immunity to an entire industry. It properly observed that importation and transmission of distant signals was not present in *Fortnightly*. It noted that this Court in *Fortnightly's* companion case *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 163-164 (1968), found that distant signal importation is a function vastly different than mere enhancement of local television reception (A. xxxii-xxxiii, 476 F. 2d at 349). See *infra* at 34.

The Court of Appeals also recognized that broadcast television stations have limited effective broadcasting ranges because television waves travel in straight lines, while the earth's surface is curved (A. xxxii-xxxviii, 476 F. 2d at 349-352), thus creating, with Federal Communica-

[6a]The court, however, affirmed the judgment of the District Court that Teleprompter's activities in origination of programming, sale of commercials, and cable television networking did not make those Teleprompter cable stations functionally equivalent to a "broadcaster" for copyright purposes. Respondents herein are challenging these rulings in Dkt. No. 72-1633.

tions Commission (hereinafter "FCC") recognition, separate television markets. See *infra* at 38-39, 56-57.

Finally, the court below acknowledged that the concept of separate television markets has been consistently accepted by the courts, the appropriate regulatory authorities and the copyright owners. In the latter connection, the court below endorsed the uncontradicted trial record which clearly shows that the copyright holders, for sound economic reasons, do not intend that the programs they license for broadcast in one "market" be distributed in another "market" without authorization. The economic reality is that a copyright owner's ability successfully to market his creation may depend on the revenue to be derived from syndicating the performance of his program in areas that did not receive it in the first instance (A. xviii n. 2, 476 F. 2d at 342 n. 2). See *infra* at 45-47.[7]

Having established the premise that a cable television station "is a 'performer' of whatever programs from these distant signals that it distributes to its subscribers" (A. xxxiv, 476 F. 2d at 350), the Court of Appeals turned to the "problem of defining what is a distant signal [as opposed to a local signal] for copyright purposes" (A. xxxiv-xxxv, 476 F. 2d at 350). It defined a local signal as one which is

> "capable of projecting, without relay or transmittal, an acceptable image * * * [receivable] off-the-air * * * by means of an antenna erected in or adjacent to the CATV community * * *." (A. xxxvii, 476 F. 2d at 351).

The Court of Appeals then noted that, if, on the other hand, a signal that has been selected and imported by a cable

---

[7] A complete record on the injury and potential injury resulting from Teleprompter's importation activities was not developed because the District Court improperly refused to admit most of the evidence in this connection as irrelevant (A. 311a, 314a, 436a-437a).

television station originates in a community other than the CATV community in question, and the cable television station, in order to import such a signal, locates its receiving antenna "in or near the originating community" or "between the originating community and the CATV community" and then transmits the signal "to the CATV community by microwave or cable, a strong presumption arises that * * * [the signal] is a distant signal." The court noted that unless the cable television station's off-the-air receiving antenna was located within a "few miles" of the cable community, the distant signal presumption would come into play. The court below held that this presumption could be overcome by a showing that the signal "would be equally receivable off-the-air in the first instance and would project an image of similar quality, if there were substantially similar receiving equipment located in or adjacent to the CATV community." (A. xxxviii, 476 F. 2d at 351-352).[8]

C. The Pertinent Facts.

To simplify resolution of the basic legal issues, Respondents elected to sue only on an illustrative group of copyrighted works. See *supra* at 4.

Similarly, while the complaints clearly alleged infringement of these works by *all* of the Teleprompter cable television stations which received and retransmitted them, Respondents, in order to expedite the trial, primarily limited their proof to the functions of five specific and illustrative Teleprompter stations located in Farmington (New Mexico), Great Falls (Montana), Rawlins (Wyoming), Elmira (New York), and New York (New York).[9] The

[8]While Teleprompter complains about the alleged unworkability of the Court of Appeals' approach, see *infra* at 68-69, it declined the suggestion of the Court of Appeals that any disputed facts be resolved by a remand to the District Court.

[9]These five were chosen as presenting for judicial consideration a representative mixture of the functions performed by modern cable

(cont'd)

activities of those cable television stations relevant to the issues involved in this docket and the Court of Appeals' specific resolution of the issues follow.

1. Teleprompter's Farmington, New Mexico Cable Television Station (described per stipulation at (A. 184a-192a, 202a-204a, 266a-271a) (see A. xxi-xxii, xxxix-xlii, 476 F. 2d at 344, 353-354; A. 116a-118a, 355 F. Supp. at 622-623).

Teleprompter's Farmington cable television station was using four of its twelve channels to import from Los Angeles, some 600 miles away, the programs of four independent (non-network) television stations.[10] Teleprompter deliberately chose to import the signals of these stations because of the type of programming they had to offer (A. 568a-570a; *cf.* A. 612a). In selecting these signals, Teleprompter chose from a virtually unlimited number of stations. Indeed, in going to Los Angeles for desirable programming it bypassed some 113 other stations nearer to or the same distance from Farmington.[11]

Having chosen to import the programming of the four Los Angeles stations, Teleprompter arranged to intercept

---

television stations. They were recognized by the courts below as illustrative "examples" (A. xx, 476 F. 2d at 346; 106a, 355 F. Supp. at 619). The facts with respect to the non-importation functions of these stations, as well as all the facts with respect to the New York City station, are set out in the Brief for Cross-Petitioners in Dkt. 72-1633 at pp. 10-12, 20-33.

[10]At p. 22 of their Brief, Petitioners misspeak when they inform the Court that there are currently no television stations in Farmington. Although there were none at the time of the infringements, an NBC affiliate, KIVA-TV, Channel 12, is currently broadcasting in Farmington.

[11]The figures here and *infra* at 42-43 concerning the number of stations bypassed by Teleprompter in choosing the stations to import are based on listings in TELEVISION FACTBOOK, vol. 41 (1971-2), a standard industry guide which is also relied upon by Petitioners. See, *e.g.*, Pet. Br. p. 35 nn. 54-57, p. 58.

their signals at a point approximately 50 miles from Los Angeles and to retransmit them to Farmington by a complex 23 step, 1,300 mile microwave system. These programs were otherwise not receivable in Farmington because of the distances involved. The Los Angeles signals imported and distributed in Farmington by Teleprompter were held to be "the clearest example of distant signal importation" by the Court of Appeals (A. xxxix, 476 F. 2d at 353).

The Farmington cable television station also imports the programs of four television stations located in Albuquerque, New Mexico, 150 miles from Farmington, including all three network affiliates and one educational station. These signals are picked-up off-the-air on a mesa 30 miles from Farmington, whence they are microwaved into Farmington for distribution to the cable television subscribers. Direct reception in Farmington of these stations is impossible because of the distances involved. As a result the Court of Appeals found that these signals were presumptively "distant" to Farmington (A. xl, 476 F. 2d at 353). In this situation, however, the court ruled that the presumption was overcome as the signals of the Albuquerque stations were available off-the-air in Farmington as a result of the authorized rebroadcasts of certain translator stations (A. xl-xli, 476 F. 2d at 353).[12]

Teleprompter also distributes the signal of the CBS affiliate in Durango, Colorado. Durango is 43 miles from

---

[12]A "translator" is a television broadcast translator station. Its function is to rebroadcast a specific television station's broadcast signals. For such purposes it is authorized both by the television station whose signals it is rebroadcasting under 47 U. S. C. 325(a) and also by the owners of the copyrights whose programs are embodied in those signals.

Only three of the four Albuquerque stations carried by Teleprompter had translator service into Farmington. The fourth, KNME, an educational station was available in Farmington only on Teleprompter cable.

Farmington, but direct reception of the Durango singals in Farmington is impossible because of a mountain wall. Teleprompter received these signals at the mesa 30 miles from Farmington and then retransmitted them by microwave into town.[13] There is no translator in Farmington that rebroadcasts the Durango signals. As a result, the Court below held the Durango station was presumptively distant to Farmington.[14]

2. Teleprompter's Great Falls, Montana Cable Television Station (described per stipulation at A. 218a-228a) (see A. xxxiii-xxiv, xxxix-xl, 476 F. 2d at 345, 353; 117a, 355 F. Supp. at 623).

Teleprompter's Great Falls Cable Television Station was using seven of its twelve channels to import the programming of seven distant television stations located all over the northwest quadrant of the United States and Canada. Signals were imported from Salt Lake City, 466 miles away (ABC affiliate and an educational station), Spokane, Washington, 286 miles away (CBS, NBC, ABC affiliates), Lethbridge, Canada, 163 miles away (CBC affiliate) and Helena, Montana, 71 miles away (a station affiliated with both ABC and NBC).[15] These signals were

---

[13]At times, Teleprompter chose to retransmit only particular segments of the Durango station's broadcast schedule so as to fit more neatly into the program format it desired to present to its subscription-paying audience (A. 118a, 355 F. Supp. at 623; A. 187a-188a).

[14]The Court of Appeals did suggest that a different result might be reached on remand and further development of the facts with regard to Durango (A. xl-xlii, 476 F. 2d at 353-354). Teleprompter failed to take advantage of this offer.

[15]Though Great Falls was 71 miles from KBLL-TV, Helena, and within what might be considered the normal range of a broadcast station, reception of KBLL's signals directly off-the-air in Great Falls was impossible and no person not a subscriber to the Teleprompter cable station was able to receive its signals (A. 219a-220a). KBLL-TV's signals were received off-the-air approximately 47 miles from Helena and imported by Teleprompter into Great Falls by a 3-hop microwave system, covering 135 miles (A. 225a).

picked up off-the-air at distances ranging between 17 and 95 miles from the originating stations and transmitted by microwave to a point in Great Falls for distribution to Teleprompter subscribers. The cable station also carried the signals of two local television stations (one station affiliated with ABC and NBC, the other with NBC and CBS).

The stations whose signals were imported were deliberately selected in consideration of the type of programming they offered, the times at which particular programs were broadcast, and the program arrangement of the stations (A. 568a-570a). Only seven of the 52 television stations in the area, not counting Canadian stations, were selected. One of the imported stations was retransmitted only on a part-time basis to accommodate the programming needs of the cable television station (A. 221a).

None of the seven imported signals was available to Great Falls viewers by any means other than the Teleprompter cable station. These signals all fell within the Court of Appeal's "distant" classification (A. xxiv, xxxvii, xxxix, 476 F. 2d at 345, 351, 353).

3. Teleprompter's Rawlins, Wyoming Cable Television Station (described per stipulation at A. 234a-240a) (see A. xxiii, 476 F. 2d at 344-345).

Teleprompter's Rawlins cable television station was using five of its twelve channels to import and retransmit the programs of five Denver television stations located 184 miles from Rawlins. Two stations far closer than Denver were bypassed by Teleprompter. These stations included stations affiliated with ABC, CBS, and NBC as well as a non-network independent station and an educational station. The signals in question were received off-the-air on antennas located between 93 and 105 miles from the transmitting antennas and were relayed to Rawlins by multi-step microwave transmission. Reception of these signals off-the-air

in Rawlins was not possible because of the distance involved and none of the signals was available to Rawlins viewers by any means other than the Teleprompter cable station. As a result they were held to be "distant" by the Court of Appeals (A. xxxix, 476 F. 2d at 352).[16]

4. Teleprompter's Elmira, New York Cable Television Station (described per stipulation at A. 205a-213a) (see A. xx-xxi, 476 F. 2d at 343-344).

Teleprompter's Elmira cable television station imports the signal of WPIX-TV, New York City (173 miles from Elmira), by means of a four-step (160 mile) microwave link. The WPIX signal, a non-network independent station, is available to Elmira viewers only over the Teleprompter cable station. In deciding to import WPIX-TV, Teleprompter passed over 57 other television stations that were as far as or closer than New York City and were not already being carried on its Elmira cable station. This signal falls within the Second Circuit's definition of "distant."

The Elmira cable television station also provides its subscribers with the programs of nine other television stations. Reception of two of these was possible in Elmira by means of rooftop antennas. Reception of seven others was generally not feasible by using rooftop antennas due to a combination of distance and topographical condition. Reception of these seven was, however, possible by a tower-mounted antenna on a hill immediately outside the city limits. As a result, they do not fall within the Court of Appeals' definition of "distant."

---

[16]The Rawlins cable television station also distributed the programming of the Casper, Wyoming television station (affiliated with all three networks), 87 miles distant. The signals of this station, although not feasibly receivable on the roof-top antennas in Rawlins, were receivable in Rawlins on tower-mounted antennas and as a result were found by the Court of Appeals to be "local" and exempt within the *Fortnightly* test (A. xxiii, xxxv, 476 F. 2d at 344-345, 350). The Casper station was also available to Rawlins viewers directly off-the-air as a result of authorized rebroadcasts of a translator.

SUMMARY OF ARGUMENT

This action was brought by Respondents pursuant to the Copyright Act of 1909. It is the only statute properly involved in this case. The decision of the court below was based on this act, its purpose, and the law that has been developed by the courts pursuant to it. The court below also considered and took into account the intent of the copyright proprietors and the economic facts upon which this intent was based.

The decision of the Court of Appeals below, holding the importation of distant signals to be a "performance" subject to copyright liability, is proper and, indeed, necessitated by well-established case law including this Court's decision in *Fortnightly*.

The attempts by Teleprompter to divert attention from the Copyright Act by harping on the Communications Act and FCC rules and regulations are misdirected and irrelevant. Its attempts to escape the conclusion of the Second Circuit by developing tautological economic arguments are unavailing. The raising of unsupported specters of the anti-competitive implications of the decision below, including economic destruction of the cable television industry, is factually unfounded. The problems with respect to the definition of distant signals as established unanimously by the Court of Appeals are overstated. And the attempt, upon the failure of its other arguments, to once again raise the discredited "license implied-in-law" argument requires little comment.

Teleprompter urges this Court to grant by judicial fiat a blanket immunity from copyright liability for an entire industry. Such a request is unjustified by any facts and has no basis in law.

ARGUMENT

I

TELEPROMPTER'S IMPORTATION AND DISTRIBUTION OF DISTANT SIGNALS IS A PERFORMANCE WITHIN THE MEANING OF THE COPYRIGHT ACT OF 1909

Teleprompter, in effect, argues that the primary policy of the Copyright Act would be served by permitting it to exploit commercially copyrighted works while prohibiting the creators of these copyrighted works from participating in the financial gain accruing as a result of such exploitation. It seeks to extend the limited copyright immunity this Court granted to a "community antenna," which merely "enhanced" the broadcast television signals already available in a community, to the selection and importation of distant television stations through the use of microwave systems and other sophisticated means of communication. It seeks to becloud the economic impact that this extension of copyright immunity would have on the creators of copyrighted works and, indeed, the impact it would have on the creation of copyrighted works, by a misreading of the policy behind the Copyright Act.

A. The purpose of the Copyright Act of 1909 is to grant statutorily protected rights of public performance to copyright proprietors in order to serve the public interest by rewarding the creators of copyrighted works by payment for these rights.

The Copyright Act of 1909 was enacted pursuant to a Constitutional provision that explicitly grants power to Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Investors the *exclusive* Right * * *" to their works. U. S. CONST. Art. I, Sec. 8, Cl. 8 (emphasis added). The Act itself provides that "Any person entitled thereto * * * shall

have the *exclusive* right: * * * (c) To * * * *perform* [the copyrighted work] in public for profit ['if it be a * * * non-dramatic literary work'], * * * and (d) To *perform* * * * the copyrighted work publicly if it be a drama * * *." 17 U. S. C. § 1(c), (d) (emphasis added).

The Congressional purpose in enacting the Copyright Act of 1909 was clear and precise. Congress determined that the public welfare and interest in dissemination of the works of authors would best be served by awarding the copyright holder the financial gains resulting from his work.

The fundamental principle of copyright law was formulated by Mr. Chief Justice Hughes in the landmark case of *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 127-130 (1932):

> "The Constitution empowers the Congress 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' Article 1, § 8, par. 8. The production to which the protection of copyright may be accorded is the property of the author and not of the United States.
>
> * * *
>
> The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property [citations omitted]. The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill

> of individuals, and the incentive to further efforts for the same important objects' [citations omitted].
>
> * * *
>
> Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants and not from any direct interest which the Government has in the use of the property which is the subject of the grants."

Thus, underlying the grant of exclusive rights to authors is the recognition that most authors would not devote themselves to creative work without the prospect of remuneration. This philosophy rejects the alternatives of aristocratic patronage or state sponsorship of artists as inconsistent with our way of life. By giving authors a means of securing the economic reward afforded by the marketplace, copyright stimulates the creation and dissemination of intellectual works. As this Court said in *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954), the Copyright Act

> "is 'intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; "to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world."' * * *
>
> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and

> inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

It is eminently clear then that the Copyright Act was specifically designed to grant "valuable and enforceable rights" to copyright owners. There was to be a judicial "encouragement" of the production of the copyrighted works, and a consideration of an "economic philosophy" to encourage individual effort "by personal gain." This "personal gain" which would "advance the public welfare" can only be realized through the creator's own exploitation or royalties from persons who commercially exploit the copyrighted works.[17]

As a result of this philosophy, the courts in applying the Copyright Act have always considered the intent of the copyright owners and the economic consequences to copyright owners of unlicensed activities. Copyright owners have traditionally been held to have the right to determine when and whom to license their exclusive rights. Indeed, prior to the CATV industry's attempts to persuade the courts to ignore such rights, these rights had

> "apparently never been seriously challenged. See, e.g., Goldsmith v. Commissioner of Internal Revenue, 143 F. 2d 466 (2 Cir.) (opinion of Chase, J.)

---

[17]While a purpose of the copyright laws is "to *induce* release to the public of the products of [an author's] creative genius," *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158 (1948) (emphasis added), (Pet. Br. 68-69, NCTA Br. 16; C. U. Br. 6) the author must be induced by "rewards commensurate with the services rendered," *Mazer* v. *Stein, supra*, 347 U. S. at 219 (emphasis added). The commensurability of the reward can only be judged by the author himself in light of his efforts and needs, and the market for his work. What Teleprompter seeks is to have an inducement commensurate with release of a work in one market set as a limit for an inducement to release to the world as a whole. See *infra* at 53-56. Such a "dedication to the public" concept has never been accepted in copyright law. See *infra* at 64.

(dictum), cert. denied, 323 U. S. 774, 65 S. Ct. 135, 89 L. Ed. 619 (1944); Herwig v. United States, 105 F. Supp. 384, 388, 122 Ct. Cl. 493, 515-17 (1952) (dictum); Milgrim, Territoriality of Copyright An Analysis of Assignability Under the Universal Copyright Convention, 12 ASCAP Copyright Law Symposium 1, 10-13 (1963). Compare Interstate Circuit, Inc. v. United States, 306 U. S. 208, 227-228, 59 S. Ct. 467, 83 L. Ed. 610 (1939)." *United Artists Television, Inc.* v. *Fortnightly, supra,* 377 F. 2d at 882-883.[18]

See *Fox Film Corp.* v. *Doyal,* quoted *supra* at 19, 286 U. S. 123, 127-130; *Manners* v. *Morosco,* 252 U. S. 317, 325-326 (1919) (Holmes, J.).

Respondents in this case exercised their statutory rights. They licensed certain performance rights in their works to particular broadcasters for telecast in the markets and communities served by those broadcasters. They did not license nor intend to license Teleprompter to retransmit royalty-free those works to communities and markets far distant from and having no relation to the communities served by the licensed broadcaster. This was so for sound economic reasons, clearly understood by the court below. See *infra* at 45-48.

B. Under all relevant pre-*Fortnightly* decisions, Teleprompter's activities in importing distant signals constitute a performance of the programs embodied in these signals.

In keeping with the Constitutional and Congressional grant of exclusive rights to copyright proprietors, the

[18]Nothing in this Court's opinion in *Fortnightly* challenges the copyright holder's complete freedom to license such exclusive rights as he has, *e.g.* the right to "perform", when and to whom he pleases. 392 U. S. at 394-395. In *Fortnightly* this Court merely stated that there was no performance involved in the activities of the Fortnightly systems there at issue. See *infra* at 30-31.

courts have consistently rejected the concept of total copyright immunity for an entire burgeoning industry.[19] Rather, the cases have consistently held that the public performance right provided by the Copyright Act embraced *every* means of communicating the contents of a copyrighted work to the public whether by motion pictures,[20] wire transmissions,[21] broadcast by radio and television,[22] including broadcast of recorded material[23] and broadcast of material received from central studio,[24] or the reception of a broadcast for communication to members of the public by wire.[25]

The fact that cable television technology was not specified by the Congress when it enacted the Copyright Act does not matter. It is immaterial that the particular art by

---

[19]The only instance of exemption of an entire industry from copyright liability is in the case of the juke-box industry, which was specifically exempted by Congress in § 1(e) of the Copyright Act. 17 U. S. C. § 1(e). See ASCAP Br. 10, 16.

[20]*Metro-Goldwyn-Mayer Dist. Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932); *Tiffany Prods., Inc.* v. *Dewing*, 50 F. 2d 911 (D. Md. 1931).

[21]*Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E. D. Pa. 1958), *aff'd sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959); *cf. Walt Disney Prods.* v. *Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W. D. Wash. 1969).

[22]*Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925); *Davis* v. *E. I. DuPont de Nemours & Co.*, 240 F. Supp. 612 (S. D. N. Y. 1965); *Dorchester Music Corp.* v. *National Broadcasting Co.*, 171 F. Supp. 580 (S. D. Cal. 1959); *Robertson* v. *Batten, Barton, Durstine & Osborn, Inc.*, 146 F. Supp. 795 (S. D. Cal. 1956); *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776 (D. N. J. 1923); *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F. 2d 829 (S. D. N. Y. 1926).

[23]*Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund, Inc.*, 141 F. 2d 852 (2d Cir.), *cert. denied*, 323 U. S. 766 (1944).

[24]*Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y. 1943); *Law* v. *National Broadcasting Co.*, 51 F. Supp. 798 (S. D. N. Y. 1943).

[25]*Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931); *Society of European Stage Authors and Composers, Inc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S. D. N. Y. 1937).

which the public was enabled to receive the performance of a copyrighted work was not in existence when the statute was enacted.[26] As the Court of Appeals for the Sixth Circuit said in *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925):

> "[T]he statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning."

The only question then is whether retransmissions of the sort at issue here are "performances" under the Act, *i.e.* whether Teleprompter's importation into distant communities of copyrighted programs from the communities in which they were initially broadcast and distribution in the distant communities is a "performance." The cases leave little doubt that under pre-*Fortnightly* law such retransmissions were deemed to be "performances," and that under the Copyright Act both a person who originates a work and one who retransmits it to a public not covered by the original transmission are "performers."

A parallel case in the field of radio is *Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y. 1943), relied on by the court below (A. xxxiii, 476 F. 2d at 349). In this case it was held that the simultaneous retransmission by a second radio station of a copyrighted work that was being originated by a radio station in another city was an infringing performance. Station WOV in New

---

[26] *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925); *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E. D. Pa. 1958), *aff'd sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959); cf. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911).

York City had infringed plaintiff's copyrighted drama by broadcasting a play copied from plaintiff's work. These broadcasts were "piped" to Station WPEN in Philadelphia, which simultaneously retransmitted the work to its listeners. Holding that the acts of the retransmitting station constituted a separate infringement of plaintiff's copyrighted drama, the court stated:

> "The William Penn Broadcasting Corporation [WPEN] was made a party to this action by an amendment of the complaint which alleges a separate and independent cause of action solely against the Penn Corporation for the infringement of plaintiff's plays. It retransmitted the episode of the play "piped" (telephoned) to it by the International Broadcasting Corporation [WOV] and thereby rendered itself separately and independently liable for infringement." 59 U. S. P. Q. at 289, 290-291.[27]

Down through the years the *Select Theatres* doctrine that simultaneous retransmission of copyrighted material to the public in markets other than the market of the originating station is a performance within the meaning of the

---

[27] *Select Theatres* was specifically approved and relied upon by this Court in *Fortnightly*, 392 U. S. at 398 n. 23. See *infra* at 36.

Teleprompter attempts to escape the obvious import of this case by reference to the fact that the affiliated station there was a statutory broadcaster and so responsible under some FCC policy statement for all material broadcast through its facilities even if originated elsewhere. Pet. Br. 49. *Responsibility* under some FCC statement certainly has no relevance to *performance* under the Copyright Act, nor does it have any logical connection with the extent to which Teleprompter's operations in importing distant signals are *functionally equivalent* to the operations of a network affiliated station under the *Fortnightly* test. See *infra* at 29-30. *Select Theatres* certainly makes no reference to such a concept of responsibility nor do any of the other cases.

Copyright Act has been consistently reaffirmed. The courts have held time and again that when a central station originates a program for broadcast in one market and affiliated stations simultaneously retransmit the program in other markets throughout the country, each affiliate retransmission is a *separate* performance under the Act. See, *e.g.*, *Davis* v. *E. I. DuPont de Nemours & Co.*, 249 F. Supp. 329 (S. D. N. Y. 1966), *Dorchester Music Corp.* v. *National Broadcasting Co.*, 171 F. Supp. 580 (S. D. Cal. 1959); *Law* v. *National Broadcasting Co.*, 51 F. Supp. 798, 799 (S. D. N. Y. 1943).

C. Under the test set down by this Court in *Fortnightly*, Teleprompter's activities in importing distant signals constitute a performance of the programs embodied by those signals.

Teleprompter treats this Court's decision in the *Fortnightly* case as if it were the only relevant decision in the copyright field. The *Fortnightly* decision, however, did not purport to overthrow all of the copyright law made since the enactment of the Act of 1909. Indeed, except for limiting the *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931), to its particular facts (392 U. S. at 396 n.18), the Supreme Court in *Fortnightly* in setting forth its "broadcaster" versus "viewer" side of the line functional test, explicitly relied upon and reaffirmed the basic and often cited earlier cases. 392 U. S. at 398 nn. 23, 24. And if *Fortnightly* is to be regarded as an exception to the earlier cases, then such an exception should, at the very least, be narrowly construed. See ASCAP Br. 12-22.

1. The *Fortnightly* case established only a limited copyright immunity.

The copyright liability of the cable industry first came under the scrutiny of this Court in 1968 with the argument

of the *Fortnightly* case. As initially conceived, a CATV functioned merely as a well-located antenna to improve fringe reception of nearby television stations. This was the type of cable system involved in *Fortnightly*. 392 U. S. at 399 (A. 298a-299a, 372a-373a, 593a, E-62, E-74, E-136).[28] The two Fortnightly CATVs (located in Clarksburg and Fairmont, West Virginia) consisted merely of receiving antennas, amplifiers and cable connecting the antennas to the subscribers. Each of the two systems carried only the programs of five television stations located in communities proximate to the cable communities. The distances between the cities in which the broadcast signals originated and the two cable communities varied between 52 and 82 miles.[29] 392 U. S. at 392. If it had not been for the hilly terrain in and around Clarksburg and Fairmont, these signals would have been satisfactorily receivable by all residents in the communities. See 391 U. S. at 391 and 337 F. 2d at 875. Indeed some residents received them in any case.[30]

---

[28]FCC Chairman Burch in a recent speech to the U. K. Standing Conference on Broadcasting, November 17, 1973, in London described, in a concise historical note, this early type of cable system involved in *Fortnightly* as "simply a mode of 'community antenna' service—whereby an entrepreneur put up a high tower and sold his subscribers the signals that were 'in the air' anyway, and that they themselves could have picked up with a sufficiently elaborate antenna." The speech is set out in full in *CATV-Newsweekly of Cable Television*, Nov. 26, 1973, at pp. 37, 38.

[29]Due to the physical nature of television signals the range of such signals is limited to about 60-100 miles, assuming there are no terrain barriers such as mountains or hills to reduce this range. See *infra* at 37.

[30]As the Court of Appeals found in *Fortnightly*:

> "some 10 to 15 percent of the locations in an around Fairmont, and 1 to 5 percent in Clarksburg * * * receive[d] satisfactory signals from the stations in suit by rooftop antennas and there was general unparticularized testimony that rooftop antennas were erected and produced satisfactory pictures at a relatively small number of favored locations." 377 F. 2d at 883-884 n. 14.

To provide satisfactory reception of these nearby signals for its subscribers, an antenna was erected by Fortnightly on a hilltop two and one-half miles from the centers of each of those two towns. These antennas picked up the broadcasts of the stations involved directly off-the-air and transmitted them by cable to its paying subscribers. *Id.* at 874-875. The two systems, in other words, each provided nothing more than a "well-located antenna with an efficient connection to the viewer's television set." 392 U. S. at 399 (footnote omitted). Some residents in the two communities, on the other hand, decided not to make use of the Fortnightly facilities and chose to erect cooperative antennas at a convenient location to alleviate their particular problems in the reception of the five stations. *Id.* at 391-2. Such cooperative antennas provided essentially the identical services provided by the Fortnightly community antennas.

It was in light of these facts that this Court set out to determine whether or not the Fortnightly CATV systems "performed," within the meaning of § 1(c) and (d) of the Copyright Act, the programs of the five television stations whose signals they retransmitted. And it was on the basis of these particular facts that this Court held that the Fortnightly CATV systems did not "perform" those programs.

In determining whether or not the defendant systems "performed" the works within the meaning of § 1(c) and (d) of the Copyright Act, this Court sought to establish a test for "performance" in the "light of drastic technological change" that had occurred since the enactment of the Act in 1909. *Id.* at 395-396. This test was based squarely on an analogy.

Traditionally, this Court said, the producer of a stage show "performs" within the meaning of the Copyright Act, but the "viewer" does not. Likewise, when a motion picture is shown in a theatre, the exhibitor but not the viewer "performs." *Id.* at 398.

Analogizing these situations to the functions of a traditional "broadcaster" as contrasted to those of a television "viewer," the Court observed:

> "The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theatre audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theatre audience. Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary." *Id.* at 398-9 (footnotes omitted.)[21]

Upon review of these historic modes of "performance," this Court stated that the resolution of the issue of whether or not the defendants "performed" depended "upon a determination of the function that CATV plays in the total

---

[21]This Court clearly intended to include broadcasts of materials furnished by others—a recorded program obtained from a syndicator or a network program from a central studio—as performances. If the unqualified statement in the text that "Broadcasters perform" leaves any doubt of this, the footnote to that statement removes it:

> "*Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (radio broadcast); *Associated Music Publishers* v. *Debs Memorial Radio Fund*, 141 F. 2d 852 (radio broadcast of recorded program); *Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y.) (radio broadcast of program received from network). Congress in effect validated these decisions in 1952 when it added to § 1(c) a special damages provision for 'infringement by broadcast.' 66 Stat. 752." 392 U. S. at 398 n. 23.

process of television broadcasting and reception," *id.* at 397; where a CATV considered "in this framework * * * falls on the viewer's side of the line" it does not "perform." *Id.* at 399. The distinction rests upon a determination of whether the function of a particular cable system is more akin to an "active performer" or to a "passive beneficiary."

A "broadcaster" according to the Court: (i) "*selects* and *procures* the program to be viewed [which he] may produce * * * himself, whether 'live' or with film or tape, *or* he may *obtain * * * from a network or some other source*"; (ii) converts the images and sounds into electronic signals and transmits them to the public, *unless* of course "the broadcaster obtains his program from a network [in which case] he receives the electronic signals directly or by means of telephone lines or microwave." *Id.* at 397; see *id.* at 400 (emphasis added). Viewers, on the other hand, merely "receive the broadcaster's signals." *Id.* at 401. A "broadcaster" is also engaged in the business of selling its time and facilities to sponsors and is concerned with program content and arrangement. *Id.* at 400, n. 28.

The Fortnightly systems, the Court found: (i) did not "select the programs to be viewed," they simply carried "whatever programs they receive"; (ii) did not "procure programs and propagate them to the public", they merely "receive programs that have been released to the public"; and (iii) had "nothing to do with sponsors, program content or arrangement," but only sold an " 'antenna service to *a segment of the public* for which [broadcasters'] *programs were intended* but which is not able because of location or topographical condition, to receive them without rebroadcast or other relay service by community antenna. . . .' " *Id.* at 400 (brackets in original, emphasis added).

The Fortnightly systems, thus examined in light of these traditional functions of "broadcasters" and "viewers," were held by this Court to be merely "passive beneficiaries" in

comparison with broadcasters. But at the same time, this Court clearly did *not* hold that only those entities that were "broadcasters" by technical FCC definition were liable for copyright infringement. Nor did it hold that all cable systems, regardless of the functions they perform, were television "viewers," mere "passive beneficiaries," or even "on the viewer's side of the line."

This Court was aware from the *amici* briefs filed in *Fortnightly* that many cable stations performed far different functions than those performed by the Fortnightly systems. However, the facts were clear that the CATV systems involved in *Fortnightly* did "no more than *enhanc*[*e*] the viewer's capacity to receive" in areas of rough terrain. 392 U. S. at 399 (emphasis added). All of the signals involved were to some extent receivable off-the-air on roof-top antennas and they were all easily available for reception by tower-mounted antennas in the CATV communities. See *supra* at 27-28. Counsel for Fortnightly, the same counsel who now represent Teleprompter, advised this Court:

> "While respondent and some *amici* raise the dread specter of CATV systems carrying signals from New York to Los Angeles * * *, microwave is not involved in this case * * *; the systems before this Court are within or near the Grade B contour, *and in the service area of the stations whose signals are made available to subscribers.*" Petitioner's Reply Brief, filed with this Court in *Fortnightly Corp.* v. *United Artists Television, Inc.*, dated March 5, 1968, pp. 1-3 (emphasis added).[32]

---

[32]Fairmont was within the Grade B contour of four of the stations in suit and Clarksburg within the Grade B contour of one. See 377 F. 2d at 883.

The Grade B contour of a television station is the boundary of a hypothetical area at whose outer limits television reception of

(cont'd)

On the basis of this representation, counsel for *Fortnightly* urged this Court that its decision in *Fortnightly* "must necessarily rest on the facts concerning the operation of Petitioner's [Fortnightly's] community antenna television systems and not on possible or theoretical operations of some CATV system in the future." *Id.* at 1-2. In response to this argument, this Court specifically limited its opinion to the particular cable systems before it, stating:

> "While we speak in this opinion generally of CATV, we necessarily do so with reference to the facts of this case." 392 U. S. at 399 n. 25. See 392 U. S. at 392 n. 6; Cross Pet. Br. 16-17.

It is clear that this Court limited its opinion in *Fortnightly,* and the copyright immunity proceeding from the opinion, solely to CATV systems performing functions similar to those performed by the systems then before it. It is equally clear that this Court was *not* including the importation of "distant" signals within that group of CATV functions it deemed noninfringing.

"a quality acceptable to the median observer" is expected to be available at least 90 percent of the time at the best 50 percent of the receiver locations,based on expected field intensities and certain assumptions as to the nature and height of the receiving antenna, and the capabilities of the television set. The predicted contours are plotted on the basis of propagation charts and rules set forth in section 73.684 of the FCC Regulations. 47 C. F. R. § 73.684.

It is ostensibly on the ground that Fairmont and Clarksburg were outside the Grade B contour of several of the broadcast stations whose signals were carried by the *Fortnightly* CATVs that Teleprompter counsel, Pet. Br. 46, now argue that "distant" signals were involved there, notwithstanding the fact that they made precisely the opposite argument in *Fortnightly.* But while at the time of the *Fortnightly* decision, the FCC was for certain regulatory purposes defining "distant" signals with reference to the Grade B contour, that definition certainly does not define "distance" for copyright purposes in the instant case, just as it did not determine the result in *Fortnightly.* Indeed, it is acknowledged by the very terms of the definition that broadcast signals can be received perfectly well beyond the Grade B contour; and, in the case of *Fortnightly,* they were.

For one thing, this Court pointed out that the cable systems which it was considering only "'sell community antenna service to a *segment of the public* for which [broadcaster's] programs were *intended* but which is not able because of location or topographical condition to receive them without rebroadcast or other relay service by community antenna. . . .'" 392 U. S. at 400 n. 28 (brackets in original, (emphasis added).[33] The evidence here, however, as clearly understood by the court below, showed conclusively that the imported Los Angeles broadcasts, for example, were not "intended" to be received in Farmington, New Mexico. See *infra* at 46. Nor was it "location" in a mountain valley or "topographical" conditions which prevented their reception in Farmington. Farmington was simply hundreds of miles beyond the transmission area of the Los Angeles stations. See *supra* at 12-13.

"For a discussion of CATV systems generally," the Court in *Fortnightly* chose to refer, (392 U. S. at 391 n. 1,)

---

[33]Mr. Justice Fortas' dissenting opinion further supports the fact that importation of "distant" signals was *not* being considered by this Court in its *Fortnightly* opinion. He points out the significant differences between such activities and the activities of the *Fortnightly* systems and he spells out how the majority's description of the *Fortnightly* practices could not apply to importation of distant signals. Specifically, he said:

> "It may be, indeed, that insofar as CATV operations are limited to the geographical area which the licensed broadcaster (whose signals the CATV has picked up and carried) has the *power to cover*, a CATV is little more than a 'cooperative antenna' employed in order to ameliorate the image on television screens at home or to bring the image to homes which because *of obstacles other than mere distance*, could not receive them. But such a description *will not* suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them *beyond the area*—however that area be defined—*which the broadcaster normally serves*. In such a case the CATV *is* performing a function different from a simple antenna for, by hypothesis, the antenna could not pick up the signals of the licensed broadcaster and enable CATV patrons to receive them in their homes." 392 U. S. at 407 (some emphasis supplied, some in original).

to its week-old opinion in *United States* v. *Southwestern Cable Co.*, 392 U. S. 157 (1968). *Southwestern* explicitly recognized that the function of importing distant television signals is different in kind from a local signal reception service:

> "CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, *they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.* As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals. [citing statistics.] * * * CATV systems, formerly no more than *local* auxiliaries to broadcasting, promise for the future to provide a national communications system, in which signals *from selected* broadcasting centers would be transmitted to metropolitan areas throughout the country." 392 U. S. at 163-64 (footnotes omitted) (emphasis added).

A functional distinction between "local" and "distant" signals in the copyright area may have been anticipated by *Buck* v. *Debaum*, 40 F. 2d 734 (S. D. Cal. 1929), and, *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F. 2d 829 (S. D. N. Y. 1926), on which this Court in *Fortnightly* relied for the proposition that "viewers do not perform" 392 U. S. at 398 n. 24.

Buck v. *Debaum* was the only one of the early broadcasting cases which found no "performance" within the meaning of the Copyright Act. In the case, the district court was faced with the question of whether a Los Angeles

cafe owner who installed and turned on a radio receiver in his cafe "performed" the programs embodied by the signals of the Los Angeles radio stations. The court held that there was no "performance" of those programs because the signals at issue were "within the range of reception," "within hearing," and "omnipresent in the air" and because the cafe owner "did not specifically intend" to pick them up. *Id.* at 734-735. The court analogized the cafe owner to "one who opened a window and permitted the strains of music of a passing band to come within the inclosure in which he was located." *Id.* at 735. The court clearly did *not* include importation of distant signals within this analogy and did *not* authorize the copyright-free importation of distant signals.[34]

The second case relied on by this Court in *Fortnightly* for the proposition that "viewers do not perform" makes it perfectly clear that the importation of "distant" signals is *not* a function of a "viewer." In *Remick* v. *General Electric*, the court held that there was a "performance" when a person "picked up" by means of a microphone another's performance of a copyrighted work and transmitted it to a segment of the public for which the performance was not intended. The court argued as follows:

> "Certainly those who listen do not perform. * * * Can it be said with any greater reason that one who enables others to hear participates in the * * * performance * * *? Surely not, if, as is argued by analogy, he merely leaves the window open, so that the strains of the music may be heard by those in the street below. Such is not the case of the broadcaster * * * who throughout the performance of the orchestra picks up each note, * * * and transmits it to persons within a radius of several hundred miles so that they can hear the original sound. It is not

[34]Teleprompter's bland exhortations to the contrary, Pet. Br. 69, are made with no discussion of the facts or reasoning of the court.

enough to say that the broadcaster merely opens the window, and the orchestra does the rest." 16 F. 2d at 829.

The "open window" analogy might have been applicable to the activities of the primitive local reception, antenna on the hill, CATV systems that were involved in *Fortnightly*. See *supra* at 27-28. The Teleprompter stations involved here, however, do not merely "open" the windows of the viewers in Farmington, Great Falls, Rawlins and Elmira. "Opening" the television window by merely putting up an antenna on some high point outside of Farmington, Great Falls, Rawlins or Elmira would not have enabled anyone in those areas to receive the signals held by the Court of Appeals below to be "distant."

Finally, the Court's reliance in *Fortnightly* upon *Select Theatres, supra* at 24-26, cited at 392 U. S. at 398 n. 23, for the proposition that "broadcasters perform" indicates that this Court recognized that the importation of distant signals was a function different in kind than the reception service with which it was then dealing and, indeed, was the function of a "performer." This was correctly recognized by the Court of Appeals below (A. xxxiii, 476 F. 2d at 349) and vainly struggled with by Teleprompter. Pet. Br. 47-49.

2. Importation of distant signals is a function that falls on the broadcaster's-performer's "side of the line" and is not that of a "passive beneficiary."

(a) The concept that there is a difference between "local" and "distant" broadcasting signals is well established and recognized.

Notwithstanding Teleprompter's attempts to suggest that the concept of "distant" signals is a peculiar invention of the Court of Appeals, *e.g.*, Pet. Br. 50, the fact that there are "distant" signals and that they are a very different matter than "local" signals is recognized by everyone familiar with broadcasting. As seen *supra* at 24-26, 34-36,

this distinction has long been recognized for copyright purposes by the courts. It has also been recognized for a variety of purposes by Congress, the FCC, copyright holders, and Teleprompter itself.

The "local"/"distant" signal distinction results from the basic fact that, because television waves travel in a straight line while the earth's surface is curved, television stations have limited effective geographic broadcasting ranges outside of which reliable reception of their programs is impossible. The average television signal cannot be received more than 60 to 100 miles from the point of broadcast although occasionally some penetrate a bit further (A. 318a, 374a, 492a-493a).[35]

---

[35]At p. 12 of Petitioners' brief they state that no testimony as to the significance of any particular distance was given by Respondents. This is just not so. The 60 mile figure was mentioned by *three* witnesses, including Jules Cohen, Petitoners' own engineering expert. (See Appdx. citations set out in the text.) Neither is it true, as Petitioners state, that Mr. Davis testified that he knew of "reception by conventional rooftop antennas at distances of 130 miles (J A 356)." Reference to A. 356a clearly shows that Mr. Davis was talking of CATV high tower reception at that distance. Finally, in the testimony at A. 477a-478a, Mr. Cohen contrary to Petitioners' statement was *not* talking of "reception by conventional rooftop antennas at distances of 150-180 miles." Pet. Br. 12 n. 19. Rather, Mr. Cohen was testifying with respect to a new *experimental* form of antenna known as a "tropospheric scatter antenna" used only by a small number of cable television stations. No such antenna was involved in the present proceedings (A. 477a-478a, 489a-492a).

The fact that an average television signal cannot be received at distances greater than 60 to 100 miles is recognized by the FCC in its assignments of broadcasting frequencies for the use of individual stations. It is a result of the physical limitations of television signal penetration that the FCC can and does assign the same broadcast frequency, or "channel," to numerous television stations operating in different geographical markets. Thus because of the distances involved the FCC was able, for example, to assign channel 4 to both KXLY-TV, Spokane and KCPX-TV, Salt Lake City. If the signals of both of these stations operating on the same channel could reach Great Falls over-the-air, the two signals would interfere with each other, so as to make them unusable to the viewer. Yet both of these stations were available to the subscribers of the Teleprompter system in Great Falls (A. 220a-221a; see A. 317a).

In recognition of the physical nature and limitations of radio and television broadcasting, the Communications Act of 1934, §§ 303(c), (d), (h), empowered the FCC to: "Assign frequencies for each individual station," "determine the power which each station shall use," "determine the location of * * * individual stations," and "have authority to establish areas or zones to be served by any station." 47 U. S. C. §§ 303(c), (d) and (h). Pursuant to these powers and others granted it by the Communications Act, the FCC has supervised the establishment and maintenance of a nation-wide system of local radio and television broadcasting stations, each with primary responsibility to a particular community.[36]

The various actions taken by the FCC down through the years in maintenance of this system—*e.g.*, the assignment of stations to particular communities, the assignment of the same frequencies to several stations in geographically different communities, the establishment of areas of primary responsibility for each station, the limitation of the power of the transmitting antennas, the definition of television reception contours for each station—have firmly established the fact that each and every broadcasting station operates in its own limited community or market and services the public only to the extent that the public is found within its market.[37]

Similarly for the FCC, upon whose cable rules and regulations Teleprompter and the NCTA rely so heavily,

---

[36]The fact that each broadcasting station has primary responsibility to and is integrally connected with one particular local community was recently re-emphasized by the FCC when it instituted its procedures for "Ascertainment of Community Problems by Broadcast Applicants." 27 FCC 2d 650 (1971). See MPAA Br. Point II.

[37]The fact that the boundaries of each particular broadcast station market are not and cannot be drawn with absolute precision, again due to the nature of television waves, has never before now resulted in a challenge to the validity of this fact. *See, e.g., Fortnightly*, 392 U. S. at 400 n. 28.

In a recent speech in London, Chairman Burch concisely set forth the basic concept of FCC broadcasting regulation as following "from

(cont'd)

recognition of this distinction between local and distant signals has played a major part in its cable television regulations since the *First Report and Order on Microwave-Served CATV*, 38 FCC 683 (1965), and the *Second Report and Order on Community Antenna Television Systems*, 2 FCC 2d 725 (1966). See *infra* at 51, 56-60.

As a result of these actions, only local signals have traditionally been available to television viewers throughout the nation, and signals originating from stations beyond this geographical range and in separate markets have been known as "distant signals." That this distinction exists for copyright purposes as well as for engineering and regulatory purposes has been recognized by the courts ever since the early days of broadcasting. See *supra* at 34-36.

The FCC itself has also recognized the distinction for copyright purposes. Thus, in his statement in the recent *Cable Television Report and Order*, 36 FCC 2d 143, 290 (1972), FCC Chairman Burch said:

> "* * * how about the courts? But, to the courts, the issue is not one of fashioning an appropriate regulatory approach. The Supreme Court in *Fortnightly* (392 U. S. at 401-402) made it clear that only Congress can do that. The Court's job was to say whether signal carriage by cable is or is not a 'performance' within the meaning of the 1909 Copyright Law, and it held that carriage of off-the-air signals (Grade B contour and just beyond) is not. The still open question—in *CBS* v. *TelePrompTer*, S. D. N. Y.—is whether cable carriage of distant

---

the fundamental rationale of our allocations scheme, under which every station is supposed to serve as an outlet for *local* expression, and this results in locally-originated news and public affairs programming in particular." (Emphasis added.) The speech is set out in full in *CATV-The Newsweekly of Cable Television*, November 26, 1973, at 37, 38. The FCC policies concerning the development of television service through the use of *local* stations are set out in the *Sixth Report and Order*, 17 Fed. Reg. 3905 (1952).

signals via microwave comes within the * * * [copyright] Law. * * *"

As will be shown below, there can be no doubt that this distinction between local and distant signals is basic to the economic relationships in the industry between the copyright holders and the broadcasting stations. See *infra* at 44-48. For the moment though, it might be noted that Teleprompter itself recognizes the distinct commercial value of programs from distant televisions stations. It advertises these imported television programs as "Exclusive on Cable TV Tonight" or "Cable TV Exclusive" (A. 540a, E-214-219, E-224-225, E-228-229). It is interesting that these programs which Teleprompter advertises as exclusively its own are the very programs that it wishes to import royalty-free on the ground that they are "intended to be received by the public." See *infra* at 64.

(b) Under the *Fortnightly* test Teleprompter's cable television stations when they import "distant signals" fall on the broadcaster's "side of the line" and are subject to copyright liability.

One of the indicia of "broadcaster" activity for copyright purposes, according to this Court in *Fortnightly*, is the "selecting" and "procuring" of the programs to be viewed by those receiving the signals. The source of the programs selected or procured was held immaterial. "He [the 'broadcaster'] may produce it himself * * * or he may obtain it from a network or some other source." 392 U. S. at 397. A viewer, on the other hand, though active to the extent of buying and operating a television receiving set, the Court found to be primarily a passive "receiver" of whatever broadcast signals happen to be in range. *Id.* at 397-398.[38]

[38]Dictionary definitions illustrate aptly the difference between the word "receive" which implies that something comes "into one's presence * * * while one is passive" and the word "procure" which imports taking "particular care or effort" in order to "cause" something to happen. See, *e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1961.

In *Fortnightly*, this Court found that the cable systems in question neither "selected" nor "procured" the programs and stations they carried. Not so here. Indeed, as the District Court below acknowledged, "[w]here they import distant signals * * * Teleprompter's systems make a decision about which stations should be received." (A. 118a, 355 F. Supp. at 623.) In short, Teleprompter systems do "select" and "procure" the distant signals.

At trial Teleprompter's Chief Executive Officer testified that in selecting the distant stations to provide its subscribers Teleprompter deliberately considered the type of programming offered by the various distant stations, the times at which the stations broadcast particular programs and the program arrangement of the stations. It was only upon consideration of all these factors and in light of its particular programming needs and the format it wished to develop that Teleprompter purposely selected the particular signals to be imported and transmitted over its cable stations (A. 568a-570a).[39] Moreover, there were occasions when Teleprompter (unlike the situation in *Fortnightly*) chose to retransmit only particular segments of the broadcast schedules of some of the stations it imported, so as to fit more neatly into the format it desired to present.[40]

---

[39]See also the trial testimony of Gordon Gray and Dale Moore, experienced broadcasters and former cable television operators (A. 371a-372a, 412a, 418a).

The extent of Teleprompter's control over the selection of the programs it imported and its audience's viewing fare is clearly demonstrated by Irving Kahn's threat to the Mayor of Farmington *not* to bring in the Los Angeles signals if the town went ahead with plans to buy and upgrade the translators which made the Albuquerque signals available without payment off-the-air in Farmington (A. 612a).

[40]For example, the Farmington cable station transmitted to its subscribers KREZ-TV, the CBS affiliate in Durango, Colorado, on a part-time basis, using the same cable channel to transmit KNME-TV, an Albuquerque educational channel at all other times (A. 187a-188a). Similarly, the Great Falls cable station transmitted KBLL-TV, Helena, over cable channel 8 only part-time, at all other times transmitting KVED-TV, Salt Lake City (A. 221a).

(cont'd)

The decisions as to which stations and programs would be selected for importation were not limited in any way by the availability of stations relatively near a cable community. Teleprompter chose from a virtually unlimited number of stations and, in making that choice, it frequently selected stations hundreds of miles away and in different time zones, bypassing numerous stations closer to its community. For example, the Farmington cable television station in going to Los Angeles to find independent television stations for its audience chose to bypass some 113 other stations that were no further away from or nearer to Farmington, including many which were more closely related to the Farmington community. In selecting the Los Angeles independents, Teleprompter consciously bypassed independent stations in Denver (KWGN-TV), Phoenix (KPHO-TV), Las Vegas (KHBV-TV), Nogales, Arizona (KZAZ-TV), and Pocatello, Idaho (KTLE-TV), notwithstanding the fact that these cities with the exception of Las Vegas are, like Farmington, in Mountain Time, while Los Angeles is in Pacific Time.[41] There is currently no FCC rule, and there never has been any, requiring or encouraging such "leapfrogging" by cable television stations.

Having "selected" the stations and programming it thought would best meet its corporate needs, Teleprompter did not just sit back, place an antenna on a hilltop two miles out of town and passively receive the signals of those stations as they rained down upon that hill. This would have

---

Teleprompter stations have also distributed imported distant signals at times other than those at which they were originally broadcast (A. 199a). Such action was held to be a "performance" under the Copyright Act in *Walt Disney Productions* v. *Alaska Television Network*, 310 F. Supp. 1073 (W. D. Wash. 1969).

[41]Similarly when Teleprompter, Great Falls, ended in importing signals and programs from Spokane, Washington 300 miles and one time zone away, Lethbridge, Alberta, Canada 163 miles away, Salt Lake City 466 miles away, and Helena, Montana 71 miles away, (cont'd)

been impossible. Rather, Teleprompter stretched out across the country in order to "procure" for its cable systems the signals of those stations which it had selected. In order to import into Farmington the Los Angeles signals 600 air miles away, for example, Teleprompter had to arrange with private microwave carriers for the carriage of the signals from a receiving antenna just outside of Los Angeles to Farmington. Since there was no direct microwave service between Los Angeles and Farmington, Teleprompter itself had to scout out an intricate hookup "via twenty-three steps over a roundabout, 1,300 mile route to establish the link" (355 F. Supp. at 622; see A. 269a-271a).[42] Moreover, once this was done, Teleprompter and the microwave carrier had still to apply for and receive permission from the FCC to establish the relay service under the FCC's microwave common carrier rules, 47 C. F. R. § 21.713. If Teleprompter had not taken even one of these various affirmative steps or if it had met with failure at any stage, the Farmington audience would still be without the Los Angeles programs.

The function of a Teleprompter cable station in importing "distant" signals is clearly not that of a simple antenna reception service. See *supra* at 42. Rather the

---

virtually reaching out over the entire Northwestern quadrant of the United States and Canada it chose to carry only seven of the 52 television stations, not counting the Canadian stations, within a radius of 466 miles.

In Rawlins, Teleprompter chose to bypass two stations far closer than the Denver stations whose signals it chose to select.

In Elmira, Teleprompter, in deciding to import WPIX-TV selected that station over 57 others which were closer or no farther than New York City and were not carried on its Elmira system.

Information based on listings in TELEVISION FACTBOOK, vol. 41 (1971-72).

[42]Teleprompter followed similar courses of action in Great Falls and Rawlins (A. 221a-226a, 236a-238a). In other instances Teleprompter itself built and owned the necessary microwave systems, e.g., the microwave system by which Teleprompter imported the Albuquerque signals into Farmington (A. 119a, 355 F. Supp. at 623; see A. 189a-190a).

cable station functions precisely like a network-affiliated broadcast station which imports network programs originated in distant broadcasting centers, usually Los Angeles or New York, by the same methods as Teleprompter—microwave, off-the-air, cable (A. 171a, 316a, 319a-320a, 388a; *cf.* 392 U. S. at 397)—and then distributes those network programs in its local community. As the affiliated station chooses and selects the network whose programs it desires to distribute—and, indeed, the network programs it desires to broadcast—so too the Teleprompter cable station chooses the station and programs it desires to distribute. As the affiliated station generally broadcasts the bulk of the program schedule offered by the network with which it has chosen to affiliate, so the Teleprompter cable station generally distributes the bulk of the program schedule of those stations it has chosen to procure.

On the basis of these facts, experienced broadcasters testified without contradiction that the importation of distant signals made the Teleprompter stations functionally equivalent to broadcasters (A. 298a-299a, 373a-374a, 387a-388a, 399a-400a). And, on the basis of these facts, the Court of Appeals below correctly concluded that the Teleprompter cable television stations when importing distant signals are under the *Fortnightly* test "functionally equivalent to a broadcaster and thus should be deemed to 'perform' the programming distributed to subscribers on these imported signals." (A. xxxiii, 476 F. 2d at 349.)

D. Application of the *Fortnightly* doctrine in the manner urged by Teleprompter, so as to grant copyright immunity to cable television stations importing distant signals, would destroy existing licensing relationships between copyright proprietors and the broadcasting industry and violate well-established copyright principles, a result abjured by this Court in *Fortnightly*.

The physical and regulatory structure of television markets and broadcasting, as discussed *supra* at 36-39, have

long been recognized by the program suppliers, the holders of copyrights for materials used on television and those involved in the production of such materials, *e.g.*, authors, music publishers, actors, directors and other creative personnel. It is on the basis of this recognition that copyright owners, including plaintiffs, have entered into negotiations for the license of their works and have actually licensed them.

This may be illustrated by the traditional use of network television programs—programs which copyright holders license for initial transmission by all television stations across the United States affiliated with a particular television network. Proof was offered at trial, to the effect that the creation of such first run television programming by the copyright owners is expensive and highly risky. At the time of the initial investment and commitment of funds, no one knows whether the program will be attractive to advertisers or to the public on the original network showing. As a result, the license fees that the copyright owners receive are limited, a substantial part of risk of loss being theirs (A. 314a). See MPAA Br. Point I(3).

Upon completion of a network run, however, the copyright holders may often syndicate a program to individual stations, television or cable, thoughout the country for further broadcast and rebroadcast or wire transmission in their respective local markets. The copyright holders can and do syndicate their programs several successive times, up to the point where the programs no longer attract an audience and advertisers. For each separate syndicated broadcast in a particular television market the copyright holder gets a license fee, recoups the balance of his investment and often makes his profit (A. 311a, 313a, 423a-425a, 428a-429a, 432a-434a, 436a-437a).[43]

---

[43]From these syndication fees, benefits also accrue to the other creative personnel involved in the industry, including the writers of screenplays, writers and publishers of music, actors, directors, etc.

(cont'd)

For these and similar economic reasons, the copyright owners who licensed programs for broadcast in one particular market, did not intend the programs to be picked up in that market by a Teleprompter cable system and retransmitted to a separate distant market. For example, they certainly never intended a program they licensed to a local Los Angeles station to be picked up and redistributed without license and without any payment whatsoever by a cable system in Farmington, any more than they would have intended that a program licensed to Los Angeles be picked up and imported by a cable system to New York, London or Tokyo (A. 311a, 421a-422a, 434a-435a, 443a-444a).

Indeed, such an intention on the part of the copyright holders would be self-destructive and would gravely jeopardize the economic value and saleability of their works. License-free importation of a particular program by a cable station from one market into another and cable distribution in the second market would materially lessen the ability of the copyright holder to subsequently license his program for a run in that second market.[44] And even if

---

This results from the fact that under the standard collective bargaining agreements in the industry, the creative personnel as part of their compensation share in the income of each re-use of the copyrighted works. Each new performance has always brought additional compensation as contemplated by the parties when they made their employment arrangements (A. 421a-425a, 428a-429a). The interest of the creative personnel and the economic effects of Teleprompter's importation of distant signals are set out at length in the brief *amicus* submitted in this docket jointly by the Writers Guild of America, the Screen Actors Guild, and the Directors Guild of America. See also the brief *amicus* filed by the Author's League.

[44]Teleprompter itself has been very concerned with the possibility that others might be destroying its revenues and opportunities by importing, carrying and distributing programs in which Teleprompter feels some proprietary interest. Teleprompter had started two suits, one in Federal Court and one before the FCC to stop a Canadian competitor of its cable station in Sault St. Marie, Ontario from using microwave and cable to import American television signals which up until recently were available in the community only on the Teleprompter cable. See the complaints in *Teleprompter Corp. v. Lake Superior Cablevision Ltd.*, File No. M42-72 CA3 (W. D.

(cont'd)

it were possible after a cablecast of the imported program to syndicate the program in that second market, the copyright holder would not be able to obtain as great a fee for it as he would have if the program had never previously been shown in that market. A second "run" fee is smaller than a first "run" fee and, similarly, a third "run" fee is smaller than a second "run" (A. 311a, 434a-437a). Thus given the fact that with each run there is a smaller audience interested in seeing the program, the intent of the copyright holders in licensing their programs for broadcast in particular markets makes perfect economic sense. See MPAA Br. Point I (2).

Traditionally, the right of a copyright holder to grant a license for only certain uses and freely to determine when and to whom to issue a license for other uses has never been challenged, whether or not the particular choice made sound economic sense. *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776, 779-780 (D. N. J. 1923); see cases cited *supra* at 21-22. The record here clearly indicates that Respondents, for sound economic reasons, did ***not*** grant nor intend to grant a royalty-free copyright license to Teleprompter's cable television stations which would permit those stations to import their copyrighted works into far distant markets for the purpose of enhancing Teleprompter's revenues and destroying their own opportunities. The Court of Appeals below recognized the record facts concerning this intent and the economic interest on which it is legitimately based; and it gave to them the weight it was bound to give under the Copyright Act and the cases applying it (A. xviii n. 2, 476 F. 2d at 342 n. 2).[45]

Mich., complaint filed June 5, 1972) and *Teleprompter Cable Services, Inc.* v. *American Microwave and Communications Corp.*, FCC Dkt. No. 72-643, complaint filed May 25, 1972 and dismissed for lack of jurisdiction, 35 FCC 2d 943 (1972).

[45]See, *e. g.*, *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954); *Washingtonian Publishing Co.* v. *Pearson*, 306 U. S. 30, 36, 39 (1939); *Herbert* v. *Shanley Co.*, 242 U. S. 591, 594-595 (1917) (Holmes, J.)

(cont'd)

Copyright Act inoperative. Pet. Br. 7-11, 14-17, 31-32, 33-34, 50-56, 70-73; NCTA Br. 5-12, 15.

These references to the Communications Act and FCC promulgations are totally misplaced. The issue is whether the Teleprompter cable stations "perform" Respondents' copyrighted works within the meaning of the Copyright Act. It is not whether the Teleprompter cable stations "broadcast" the copyrighted works within the meaning of the Communications Act or the rules promulgated by the FCC.

The rights of the copyright holders are based on the Copyright Act of 1909, enacted pursuant to Article 1, Section 8, Clause 8 of the UNITED STATES CONSTITUTION, which grants Congress the power "to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right * * *" to their works. It was this Act of Congress and this Constitutional provision with which the Court of Appeals below was concerned. Other acts and agency policies were correctly ignored as irrelevant.

There is no substance to the contention that the Communications Act amends, limits, modifies, supersedes, or makes exceptions to the Copyright Act. Section 414 of the Communications Act, 47 U. S. C. § 414, specifically provides that:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but provisions of this chapter are in addition to such remedies."

In *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940), this Court said, "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication." Similarly, in *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F. 2d 348, 349 (9th Cir. 1964), *cert. denied*, 379 U. S. 989 (1965), the

Ninth Circuit noted that Congress "had not pre-empted the adjustment of property rights in the communication field by passage of the Communications Act."[49]

Nor has the FCC ever contended that its rulings or the provisions of the Communications Act can or should override copyright obligations. On the contrary, the FCC has consistently stressed that it has never intended by its cable rules to "affect in any way the pending copyright suits, involving matters entirely beyond * * * [the FCC's] jurisdiction." Indeed, the Commission has bluntly stated that its rules afford "no defense * * * in a copyright suit." *Second Report and Order, Community Antenna Television Systems,* 2 FCC 2d 725 at ¶ 108 (1966).

On February 2, 1972, the FCC adopted a *Cable Television Report and Order,* 36 FCC 2d 143, in which certain "exclusivity rules" were imposed on the Cable Television Industry (47 C.F.R. 76.91-159, set out at 36 FCC 2d at 233-236) and the number of distant signals a cable station may import was limited (47 C.F.R. 76.51-65, set out at 36 FCC 2d at 220-233). Teleprompter and the NCTA now contend that by these rules the FCC has taken into consideration all the legitimate interests of the copyright owners and that as a result no further protection is due them. Pet. Br. 54-55; NCTA Br. 15.[50]

---

[49]The only case cited by Teleprompter in support of its plea that this Court pre-empt the Copyright Act is *Farmers Union* v. *WDAY,* 360 U. S. 525 (1959). That case is by no stretch of the imagination applicable to the instant situation. In it this Court held that a section of the Communications Act *specifically* denying a broadcasting station the right of censorship over a candidate for public office pre-empted a *state* libel law. Here, Teleprompter is urging that this case should result in the pre-emption of a *Congressional* act by agency regulations. Pet. Br. 73. Even Consumers Union filing *Amicus* in support of Teleprompter recognizes the inapplicability of *Farmers Union* for this proposition. C. U. Br. 18.

[50]It might be noted the NCTA has very recently filed with the FCC a *Petition for Rule-making* in the Matter of *Amendment of Subpart F. of Part 76 of the Commission's Rules and Regulations*

(cont'd)

Such reliance is unjustified. It is clear from the face of the *Cable Television Report and Order* that these rules were only adopted with the understanding and in the hope that the underlying copyright issues were shortly to be solved in forums and by parties other than the FCC. *Cable Television Report and Order*, 36 FCC 2d 143, ¶¶57-67 at pp. 164-168. As FCC Chairman Dean Burch explained in his concurring statement:

> "* * * one of the gut issues of the cable controversy [is] that cable remains an uneasy outsider with respect to the programming market. And only when its right to the use of its basic product is secure and regularized, only then will its future be unclouded. It is this issue that the Federal Communications Commission can neither resolve, nor avoid." 36 FCC 2d 143, 290 (1972).

"Copyright policy," as Chairman Burch told Congress in a letter dated August 5, 1971, "is most appropriately left to the Congress and the courts. * * * In short, we believe that the two matters—cable regulation and copyright—can be separately considered."

In any event, the decision below does not conflict with FCC regulatory policy with respect to the development of cable stations.[51] The Second Circuit did not seek to stop the importation of distant signals by Teleprompter. It simply stated that cable stations that import programming from

---

with Respect to Network Program Exclusivity Protection by Cable Television Systems (November 9, 1973) in which the NCTA requests that the exclusivity rules, which prohibit a cable television station from importing a distant signal which embodies a program that is simultaneously being shown on a local station, be repealed. *Id.* at 2-6.

[51]The irrelevancy and inapplicability of the various FCC regulations relied on by Teleprompter and the NCTA is more fully developed in the *amicus* brief filed by the MPAA at Point II.

distant stations must, like any other user of copyrighted works, pay royalties for the use of those programs.[52]

This is wholly in accord with what the FCC itself has said in its *Further Notice of Proposed Rulemaking* (Cable Television Docket), 27 FCC 2d 13 (1971), at ¶ 4:

> "The copyright owner must be given fair and adequate compensation for his creative work; that is the cornerstone of the whole system."

"First," Chairman Burch recently told a gathering of the NCTA, "we have to assume a copyright resolution, to establish beyond any question the principle that cable pays for the product it uses."[53]

B. Teleprompter's economic argument, based on a misuse of the term "Coverage Area" of broadcasting stations, is strained and incorrect.

Teleprompter seeks to becloud the significance of its importation of signals into communities far distant from the market area of the originating broadcasting stations by relying on what it calls the "coverage area" of the various broadcast stations as purportedly

---

[52]Teleprompter, NCTA and Consumers Union all express concern that holding cable television stations liable for copyright for programs on the distant signals which they import would frustrate the broadcast allocation objectives the FCC hopes to accomplish by means of cable television. Pet. Br. 52-54; NCTA Br. 5-12; C. U. Br. 18-19. But as the NCTA itself admits these are objectives that the FCC has in the past attempted to implement by means of UHF broadcasting, translator, and satellite stations. NCTA Br. 6-7; see NCTA Br. in Support of Petition 10-12, filed June 5, 1973. All of these other means by which the FCC has attempted to implement the same policies, however, are admittedly liable under the Copyright Act and do in fact obtain copyright licenses from copyright owners. There is certainly no reason why cable stations should be treated differently, even assuming the FCC had the power, which it clearly has not, to cause them to be treated differently.

[53]Address by FCC Chairman Burch to the National Cable Television Association, June 19, 1973.

of the New York station. Moreover, it would require the absurd belief that a local New York department store which advertised on the New York station would be prepared to pay approximately double for its advertising since the inclusion of Tokyo would double the station's "coverage area."

Tokyo is not in the New York market any more than Farmington is in the Los Angeles market or Great Falls in the Salt Lake City market despite the selection and procurement of a Teleprompter cable station, a selection that might change and a procurement that might cease at any time. These selections and procurements are made by Teleprompter for its own benefit without the consent of the copyright owners and contrary to their intent. Certainly a copyright owner could not base any royalty negotiations on such a "coverage area" which might be enlarged or contracted at any time, without notice, at any cable station's whim.

Contrary to Teleprompter's arguments, Pet. Br. 50-52, the FCC has found that distinct localized markets do exist in the television industry. See *supra* at 38; MPAA Br. Point II. The FCC has specifically identified many of them in its distant signal importation regulations. 47

Falls as within the Salt Lake City "coverage area." *Television Factbook*, vol. 31 at pp. 692, 695 (1961). It was only after Teleprompter began the importation of KCPX-TV into Great Falls, that Cascade County appeared within the "coverage area" of KCPX-TV for ARB purposes. TELEVISION FACTBOOK, vol. 42 at p. 809-b (1972-73).

Similarly, Farmington, San Juan Co., New Mexico did not appear in the "coverage area" studies of KTTV, Los Angeles before Teleprompter began to import KTTV into Farmington in November, 1970. Compare TELEVISION FACTBOOK, vol. 42 at pp. 86-b, 91-b (1972-73) with TELEVISION FACTBOOK, vol. 38 at p. 76-b (1968-69).

It might be noted that although station KCPX-TV (ABC) in Salt Lake City is described as having "coverage" in Great Falls, Cascade County, Montana by TELEVISION FACTBOOK, vol. 42 (1972-73) at p. 809-b, station KSL-TV (CBS) of Salt Lake City is not indicated as having any coverage in Cascade County, *id.* at 811-b, 813-b. This results from the fact that Teleprompter imports KCPX, but not KSL into Great Falls.

C. F. R. § 76.51 as set forth in *Cable Television Report and Order*, 36 FCC 2d at 220-221. This fact, in itself, negates Teleprompter's "coverage area" argument.

Teleprompter attempts to escape this conclusion by maintaining that the FCC used ARB ratings in ranking the television markets. Pet. Br. 18, 61. This assertion is highly misleading. Rather, recognizing the fact that ARB generally includes *ex post facto* cable coverage in its television station "coverage areas," the FCC, to properly rank the various television markets and correctly identify which signals are "local" and which "distant" for the purpose of its cable regulations, had ARB prepare a *special* study of television station circulation from which cable "coverage" was specifically excluded.[56] It was on the basis of these ARB studies, from which cable station "coverage" was specifically and intentionally excluded, that the FCC compiled its television market definitions. *Cable Television Report and Order*, 36 FCC 2d 143 at ¶¶ 81-85; 47 C. F. R. § 76.54(a) set out at 36 FCC 2d at 229; and Appendix B to *Memorandum Opinion and Order on Reconsideration of the Cable Television Order*, 36 FCC 2d at 378 (1972).[57]

Indeed, any other approach by the FCC would have flown directly in the face of its "long standing allocations" and market identification policies which

> "* * * do not contemplate that a major television market should become to a significant extent, merely a satellite of another major market for television purposes, since that would thwart the local service

[56]At notes 33 and 92 of Petitioners' Brief, Teleprompter briefly acknowledges that this ARB study was "special" in some way.

[57]By this same token, the granting to a cable station of a microwave license to retransmit a certain broadcast station's signal is not an expansion of that television station's natural market. Pet. Br. 51-52. If such were the case, the precaution taken by the FCC in the

concept of the Communications Act. (See Sections 303(b), 303(h); see legislative history of Section 303(s); *Second Report*, 2 FCC 2d at 770-771). As stated in the *Midwest* case (13 FCC 2d at 501), if such a result were deemed in the public interest, the Commission would follow the direct approach of granting increased height and power to stations in the largest communities and authorizing them to operate translator and satellite facilities in other sizable communities." *Notice of Proposed Rule-making and Notice of Inquiry*, 15 FCC 2d 417 at ¶34 (1968).[58]

Importation of distant signals copyright-free by cable stations, rather than being of value to copyright owners and the television industry, is a grave threat to them. This is clearly recognized by both the copyright owners and the television industry. *Supra* at 46-47. It has also been recognized by this Court and the FCC. For example in *Southwestern*, this Court recognized that

"Although CATV may in some circumstances make possible 'the realization of some of the [Commis-

---

Cable Television Report and Order would be meaningless. The microwave license itself (E-359-360) gives no indication that by means of the licence the FCC is expanding the "coverage area" of the broadcast stations carried or supplanting copyright licensing obligations. Indeed, as the Commission has indicated on a number of occasions, it has neither the authority nor the intent to grant copyright licenses or affect copyright rights. See *supra* at 50-53.

[58]It is irrelevant that some television stations may claim certain distant areas to be within their "coverage areas" or that rating services may show such data or that some advertisers may want wider coverage. Neither the stations nor the rating services nor the advertisers own the copyrights. The record clearly establishes that the copyright owners did not intend to grant copyright licenses to the cable stations for carriage of their programs to the distant markets. *Supra* at 46.

> sion's] most important goals,' *First Report and Order* [38 FCC 683] at 699, its importation of distant signals into the service areas of local stations may also 'destroy or seriously degrade the service offered by a television broadcaster,' *id.*, at 700, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations." 392 U. S. at 175 (footnote omitted).

In its *Second Report and Order* (1966), the FCC concluded that unrestricted cable importation of distant signals may harm the public interest by: (1) discouraging new program sources (*Second Report and Order, Community Antenna Television Systems*, § 153 n. 70, 2 FCC 2d 725, 787 (1966)); (2) destroying local broadcasters (*Id.* ¶ 123, 2 FCC 2d at 774); and (3) precluding the establishment of educational broadcasting stations (*Id.* ¶ 93, 2 FCC 2d at 762).

> "Indeed the anomalous conditions [cable station receipt and retransmission of distant signals] could have an adverse effect on development of new program sources. Multiple owners such as Westinghouse or Metromedia have undertaken some development of new programs; this endeavor promotes the public interest by increasing the programs available and diversifying their sources. But, as Westinghouse points out, the undertaking is a difficult one, which might not be sustained if the programs are brought into the major markets by CATV systems of significant size or impact, thus diminishing or ending the opportunity for the sale of the programs in these markets. The same consideration might be pertinent in the case of the development of a fourth network." *Id.* ¶ 153 n. 70, 2 FCC 2d at 787.

Similarly, in its *Notice of Proposed Rulemaking and Notice of Inquiry* in Dkt. No. 18397, 15 FCC 2d 417 (1968), the FCC expressed quite emphatically its concern about the copyright-free importation of distant signals by cable television stations and the impact of this inherent "unfair competition" on broadcasters:

> "* * * because CATV presently stands outside the competitive TV program distribution market (paragraphs 132-133, *Second Report*), an anomalous and completely unfair situation is presented. * * * And, even more important, both the CATV system and the broadcast station are large scale operations competing for audience—yet the one pays for its product and the other without any payment, brings the same material into the community by simply importing the distant signals (para. 135, *Second Report*).
>
> "* * * The unfair competition * * * will be a significant factor in the development or healthy maintenance of television broadcast service." *Id.* at ¶¶ 35-36.[59]

Just last month Chairman Burch reaffirmed this concern with the "unfair competition" aspects of cable television's copyright-free use of broadcast signals:

---

[59]When Teleprompter feels that it is being forced to compete on unfair terms it does not hesitate to assert its rights and demand equal treatment:

> "The cable operation should not . . . be placed at a disadvantage by being forced to compete with other parties who provide comparable services but do not accept the same regulatory responsibilities and burdens. *It is an elementary principle of equity that parties engaged in similar pursuits should compete on comparable terms.*"

Comments of Teleprompter Corporation, In the Matter of *Various Methods of Transmitting Program Material to Hotels and Similar Locations, et al.*, FCC Dkt. No. 19671 *et al.* at ¶¶16-17 (May 21, 1973) (emphasis added). See also Comments of the NCTA in the same FCC docket at ¶¶ 2-4, 10, 12 (May 21, 1973) (this docket concerns rulemaking relating to the impact of various methods of program distribution, not at present subject to FCC regulation, on broadcast and cable television).

> "Inevitably, cable television with its multiplicity of channels poses a very real threat to conventional broadcast television; it tends to carve up the available audience; it competes for some of the same programming; and, ironically enough, it builds this competitive threat on the base of retransmission of broadcast signals for which up to now it pays nothing. (This is another facet of the cable problem! Cable systems do not yet pay for the product they use, insofar as this product is conveyed over broadcast signals, and this unresolved copyright issue is a principal barrier to cable's acceptance and to its assured growth. * * *)"[60]

It is quite clear that the Court of Appeals correctly understood the economics of the broadcasting and cable industries.[61]

C. Teleprompter's "license implied-in-law" argument, even recast as a "dedicated to the public" argument, has no basis in law and has been repeatedly rejected by the courts.

In its struggle to find a way to escape liability for what is clearly an infringing performance, Teleprompter resurrects yet again the "license implied-in-law" argument. Pet. Br. 73-78. This argument was explicitly rejected by the Court of Appeals in *Fortnightly* with respect to the "local" signals that were there involved. 377 F. 2d at 881-883.

---

[60]Address in London, November 17, 1973. The speech is set out in full in *CATV-Newsweekly of Cable Television*, November 26, 1973, at 37, 42.

[61]Teleprompter's arguments to the contrary based on the Cost of Living Council actions are similarly irrelevant and misplaced. Pet. Br. 60-61. Respondents do not deny that "pricing in the industry is (cont'd)

Though this Court never explicitly reached the question of "license implied-in-law" in *Fortnightly*, 392 U. S. at 401 n. 32, it implicitly did so. As the Court of Appeals rightly pointed out (A. xxxviii n. 18, 476 F. 2d at 352 n. 18), the compromise proposed in *Fortnightly* by the Solicitor General was based on a "license implied-in-law." The compromise was rejected. This Court refused to distort the Copyright Act by accommodating it to allegedly conflicting policies of communications and antitrust. Rather, this Court insisted that such a job was for Congress and it merely took "the Copyright Act of 1909 as we find it." 392 U. S. at 401-402.

The attempt to resurrect the "license implied-in-law" theory here is even more misguided than originally, for here the question is whether such a license can be implied with respect to "distant" signals broadcast in markets wholly unrelated to markets served by the Teleprompter cable television stations. The Solicitor General, who supported the concept of a "license implied-in-law" theory in *Fortnightly*, supported it only with respect to "CATV carriage of signals within the normal service area of the originating stations."[62]

While the cases relied on by Teleprompter, the same which were relied on in *Fortnightly* for this proposition,

---

based upon 'anticipated and actual public response'." Respondents say only that the response looked to is the response of the public in the particular market which is covered by the initial broadcast and that the record clearly shows that no attention is paid to such response in distant cable communities to which the broadcast is retransmitted. This is based on sound industry economics which was readily recognized and understood by the Court of Appeals below.

[62]Memorandum for the United States as *Amicus Curiae*, filed in the Supreme Court in January 1968 in *Fortnightly Corp.* v. *United Artists Television, Inc.* Dkt. No. 618, at p. 11. The Solicitor General's approach resulted in large part from the economics of the broadcasting industry, which as discussed *supra* at 44-47, recognizes a distinct difference between local and distant signals, notwithstanding Teleprompter's atttempts to brush it under the rug. *Id.* at 9-11. See MPAA Br. Pt. I(2).

did not lead to any implication of a copyright license in the case of the "local" signals there at issue, they certainly cannot lead to any such implication here. The "long line of cases" to which Teleprompter refers, Pet. Br. 75, is just non-existent. As the Solicitor General in *Fortnightly* readily admitted, "We recognize that there is a significant lack of precedent for the implication of a copyright license in light of policy considerations."[63]

As the Solicitor General said, "The dictum in *Jewell-LaSalle* (283 U. S. at 199 n. 5) is not persuasive authority * * *."[64] Nor is *Buck* v. *Debaum* relevant. That case, as *Fortnightly*, merely held that the receipt of a local signal was not a performance protected by the Copyright Act. See *supra* at 34-35. The other three cases cited by Teleprompter as supporting the license are completely inapposite. Both *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476 (1964), and *Adams* v. *Burke*, 84 U. S. (17 Wall.) 453 (1873), are patent cases which this Court in the only other case cited by Teleprompter, *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 346 (1908) said " 'are not altogether controlling' " due to the " 'wide differences' " between the rights protected by the copyright statutes and those secured by the patent statutes. Nor does the *Bobbs-Merrill* case itself support any type of "license implied-in-law" under the copyright statutes. That case merely established the "first sale" doctrine whereby a copyright owner who has authorized the sale of a copy of his work, *i.e.* the transfer of title to the principal copy, cannot control the resale of the copy, although he can prevent the reproduction, recording, or performance of his work from the copy.[65]

---

[63] *Id.* at 7-8.

[64] *Ibid.*

[65] In the instant case there has been no sale by Respondents of the copyrights here at issue. There have only been *licenses* to perform for specific purposes. In *Bobbs-Merrill*, the Court specifically

(cont'd)

Realizing the weakness of this "license implied-in-law" argument under copyright precedent, Teleprompter supported by the NCTA attempts to reclothe it so that it would appear to have the blessings of the Communications Act. Teleprompter maintains that, as a result of the Communications Act's definition of broadcasting, 47 U. S. C. § 153(o), once a copyrighted work is licensed to any broadcaster and once it is broadcast by any one broadcast station anywhere, it must be *"intended"* for the public everywhere and in the public domain. Pet. Br. 69-70, 76-77; NCTA Br. 12.

Teleprompter, of course, in advancing this argument ignores the active-passive dichotomy set down by this Court in *Fortnightly* as well as the explicit proviso in § 414 of the Communications Act that no private rights are abridged by the provisions of the Communications Act. See *supra* at 50. Similarly it ignores the fact that this "dedication to the public" theory has been universally rejected by a long line of judicial precedent going back to the early days of the Copyright Act, a line which was reaffirmed by this Court's decision in *Fortnightly* where the copyright liability of broadcast network affiliates was restated. 392 U. S. at 398 n. 23.[66]

If a license for Teleprompter's activities in importing programs one-quarter of the way across the country from

---

noted that its decision did not cover a licensing situation, but only an outright sale: "There is no claim in this case of contract limitation nor license agreement controlling the subsequent sales of the book." 210 U. S. at 350.

[66] *See, e.g., Ferris* v. *Frohman*, 223 U. S. 424, 435-436 (1912) (". . . the public performance of the play is not an abandonment of it to the public use."); *King* v. *Mister Maestro, Inc.*, 224 F. Supp. 101, 105-107 (S. D. N. Y., 1963); *Uproar Co.* v. *NBC*, 8 F. Supp. 348, 362 (D. Mass., 1934) (the broadcast of a script by radio "cannot be held to be . . . a dedication of it to the public at large."), *aff'd.*, 81 F. 2d 373 (1st Cir.), *cert. denied*, 298 U. S. 670 (1936); Nimmer, *Copyright Publication*, 56 Colum. L. Rev. 185, 194-195 (1956). This Court, per Mr. Justice Holmes, recognized in *Manners* v. *Morosco*, 252 U. S. 317, 325-326 (1919), the legitimacy of a copyright owner limiting the grant of a license to perform the work publicly, including limiting the performance to certain specific territories.

(cont'd)

Los Angeles to Farmington is to be implied here, it must be implied under the Copyright Act. As the Court of Appeals below correctly recognized there is just no basis for such an implication (A. xxxviii n. 18, 476 F. 2d at 352 n. 18).[67]

D. The rule of the Court of Appeals below does not threaten the viability of cable television.

Other arguments having failed them, both Teleprompter and the NCTA present all manner of dire predictions as to supposed effects of holding cable television stations liable under the Copyright Act for the performance of programs they import from distant stations. Pet. Br. 5, 14, 29-30, 32-33, 37-38, 55-56, 66-67, 78; NCTA Br. 12-15. They raise the specter of television networks exercising their alleged powers to drive cable television stations out of markets and charge that the effect of this will be to deprive the public of access to cable television and its great benefits. Pet. Br. 5, 14, 29-30, 37-38, 55-56, 66-67, 78; NCTA Br. 12, 15. They complain that there is a lack of any "mechanism" by which cable television operators can negotiate with program suppliers for copyright licenses. Pet. Br.

The law is clear that multiple broadcasts of a single program, though simultaneous, give rise to multiple performances within the meaning of the Copyright Act. For instance a network show broadcast by 100 affiliates is performed 100 times. *See Law* v. *National Broadcasting Co.*, 51 F. Supp. 798 (S. D. N. Y., 1943) (network broadcast on three occasions over 67, 66 and 85 stations give rise to 218 "performances"); *Davis* v. *E. I. DuPont de Nemours & Co.*, 249 F. Supp. 329 (S. D. N. Y., 1966); *Select Theatre Corp.* v. *Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y., 1943) (specifically approved by *Fortnightly*, 392 U. S. at 398 n. 23).

[67]It should be noted that in all the various pieces of legislation that have been introduced down through the years which deal directly with the copyright liability of cable television, not one has proposed immunity for importation of distant signals by a cable television station. See, *e.g.*, S. 3008, 88th Cong., 2d Sess. (1964) at § 5; H. R. 4347, 89th Cong., 2d Sess. (1966) at § 111; H. R. 2512, 90th Cong., 1st Sess. (1967) at § 111; S. 543, 91st Cong., 1st Sess. (1969); S. 644, 92d Cong., 1st Sess. (1971); S. 1361, 93rd Cong., 1st Sess. (1973) at §§ 101, 106, 111.

38; NCTA Br. 14-15. They urge that application of the rule established by the court below would "inundate" cable television stations with litigation totally disruptive of their operations. Pet. Br. 32-33, 66; NCTA Br. 12-13. They charge that potentially huge damages, as a result of this decision, threaten the very existence of cable television stations. Pet. Br. 33, 67; NCTA Br. 3, 13-14. These claims are without merit.

With respect to the specter of "network" domination Teleprompter appears to rest solely on one CBS press release, which it argues shows that CBS plans to use its power over its copyrighted programs to maintain its control over the broadcasting industry and to deprive large segments of the public of television service. Pet. Br. 5, 29-30, 37-38, see 14, 55-56, 66-67, 78. The phrases quoted by Teleprompter are taken completely out of context. Reference to the press release (E-469-471) makes it clear that CBS stated that it would not " 'assert its statutory rights' to prevent CATV reception * * *." Pet. Br. 37. Rather, it would act only as a defensive measure "should CATV retransmission of network programming force stations off the air in some communities." Indeed, the final paragraph of the release clearly states CBS' corporate policy:

> "Once copyright is established CBS will grant CATV systems permission to use its network television programs when those systems are the only means by which satisfactory television service will be available."

The specter of a "network" conspiracy to exclude cable television from the program market is totally irrelevent to the present action. This Court in *Fortnightly* was presented with similar arguments, but refused to take them into consideration, holding that they were for Congress and that the Court's job was to "take the Copyright Act of 1909

as we find it." 392 U. S. at 401-402. In any event, there was no evidence below of any great power the networks have to deny copyright licenses to cable television stations.

Teleprompter raised similar antitrust allegations as defenses in its answers to the several complaints (A. 37a-38a, 63a-65a, 96a). They are not, however, properly before the Court at the present time, having been specifically eliminated by Pre-Trial Order No. 1 from the first stage of this action, the only stage which Teleprompter can now bring to the attention of this Court (A. 72a, 101a). No proof has been taken with respect to these allegations and no record has been developed. What Teleprompter is in substance trying to do by making these arguments to the Court at this time is to ask for summary judgment with respect to these allegations. This is highly improper. Accordingly, we ask the Court to disregard them.

Nor is there any support in the record or elsewhere that any of Teleprompter's and the NCTA's dire predictions of exclusionary practices will come to pass. If such conduct ever does occur, the government or the aggrieved parties could quite properly find appropriate relief in the courts. Distorting the law as it presently exists, however, to prevent possible future abuses is not justifiable. See MPAA Br. Point IV (2).

Nor is there any substance to the complaint that cable television stations should not be liable for copyright infringement because there is no "mechanism" for them to negotiate for copyright licenses. Teleprompter has never made any effort to negotiate such licenses with Respondents and has always acted on the assumption that it could enjoy perpetually the fruits of its misappropriation. The Court of Appeals has made it clear that the courts have not granted blanket copyright immunity to an entire industry. Once it is certain that this decision is final and no longer subject to

review, a "mechanism" will be found.[68] See MPAA Br. Point IV (1).

The allegations of the "overwhelming burden of litigation" that will have to be borne with disruptive effect on cable television service as a result of "the uncertainty of the test" propounded by the Court of Appeals are similarly unfounded. Pet. Br. 66; NCTA Br. 13. In only a relatively small number of situations will litigation as to whether a particular signal is or is not "distant" have to be embarked upon as a result of the decision below. In the usual situation it will be quite evident on the face of the matter whether a signal is "distant" within the test set forth below or "local." The Court of Appeals below certainly had no trouble deciding that Los Angeles signals are distant to Farmington, that Denver signals are distant to Rawlins, or that Spokane and Salt Lake signals are distant to Great Falls. Similarly, there would be little difficulty from the face of the matter in recognizing that the signals carried by the Teleprompter New York City cable station, or those carried by the Fortnightly systems, are local.[69]

While it is true that perhaps the Court of Appeals' test as to the point beyond which a receiving antenna will no longer be considered "near" or "adjacent to" a cable com-

---

[68]As was found in THE FUTURE OF CABLE TELEVISION a study of the field by Dr. Leland Johnson, an independent expert, at p. 17n. (Rand Corp. Report prepared for The Ford Foundation, 1970):

> " 'The supposed difficulty of obtaining retransmission consent strikes me as nothing but a red herring. If cable were paying for retransmission, the owners of copyright would think of a way of selling the rights.' "

Indeed, the fact that such "mechanisms" do exist is clearly exemplified by the fact that every other class of copyright users has managed to deal successfully with the copyright proprietors.

[69]Indeed, given the numerous situations with which it was presented, the court below found only one, Durango, where it was uncertain and thought that the facts might be further developed. Teleprompter declined the opportunity for clarification (A. xli-xlii, 476 F. 2d at 354).

munity is not a precise mathematical formula, a "precise" definition is not possible given the nature of broadcasting. But the fact that there definitely is a distinction between "local" and "distant" signals is clear, as is the fact that there are very distinct television markets. See *supra* at 36-39, 56-58. The Second Circuit's touchstone for local signals as signals receivable on an antenna located within a "few miles" of the receiving community does not yield to an unbearable vagueness or to burdensome variations in understanding. Thirty miles was explicitly held to be beyond this limit (A. xl, 476 F. 2d at 353).[70]

As a last resort Teleprompter and the NCTA argue that a finding of infringement here would "bankrupt the cable television industry in an attempt to satisfy the potentially huge amount of damages." NCTA Br. 3. The concept that the decision of the Court of Appeals sounds the death knell of cable television is not before this Court now[71] and is, in any event, ludicrous.[72] The decision below

---

[70]After years of experimenting, the FCC in 1972 revised its definition of "local" and "distant" signals for cable carriage purposes. *Cable Television Report and Order*, 36 FCC 2d 143, 173-176, as codified in 47 C. F. R. §§ 76.54, 76.57, 76.59, 76.61. This current amalgam definition of "local signals" includes the signals of stations within 35 miles of the cable system, signals meeting a "significant viewing" test, market signals in hyphenated (overlapping) markets, and in some cases Grade B signals.

Application of this new FCC definition to this case would have achieved virtually the same specific results reached by the Court of Appeals formulation. (At the same time, application of the current FCC definition would solve the allegedly anomalous decision by the court below with respect to the Durango station. See Pet. Br. 72-73.)

[71]The damage issue was separated out from this first stage of this case by Pre-Trial Order No. 1 (A. 72a, 101a). The Court of Appeals remand order specifically covered the damage issue (A. xliv).

[72]On the contrary, it is interesting to note that following the rendering of the decision of the Court of Appeals both Teleprompter and the NCTA released to the press generally self-satisfied and congratulatory statements. Such terms as "particularly pleased" and "encouraging" were used. David Foster, the President of the NCTA, even said that "we are pleased that the courts have not permitted the

(cont'd)

merely recognizes the obligation of cable television stations to compensate the owners of the copyrights of those programs on which they base their business. Neither CBS nor any of the other plaintiffs in this action is desirous of extracting unreasonable sums from the cable television industry. Indeed, Teleprompter concedes that CBS has made it clear that it is *not* seeking "large damages." Pet. Br. 37.

Both Teleprompter's and the NCTA's purported fears are rooted in the erroneous assumption that statutory damages of not less than $250 per infringement would automatically be granted. Pet. Br. 33, 67; NCTA Br. 3, 13-14. This Court, however, has made it clear that in copyright cases the courts have wide discretion among the remedies of actual damages, accounting and statutory damages, and that they are to be governed by the equities of the case and the policies of the Copyright Act. *Woolworth Co.* v. *Contemporary Arts*, 344 U. S. 228, 231-232, 234 (1952). One of the obviously relevant factors is the degree to which the copyright proprietor has actually been damaged, and this will vary greatly from case to case depending upon the particular facts. See, *e.g., Shapiro, Bernstein & Co., Inc.* v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236 (9th Cir. 1966) (where *de minimis* damages shown, the court denied the granting of statutory damages). The Court of Appeals below itself recognized that no more than *de minimis* damages might be involved in certain instances here (A. xlii, 476 F. 2d at 354). See MPAA Br. Point V.

---

copyright issue to interfere with the growth of the [cable] industry." This is hardly consistent with their present claim that they stand on the brink of catastrophe. *See Cable News*, March 12, 1973 at 6; *Broadcasting*, March 12, 1973 at 12; *CATV-Newsweekly of Cable Television*, March 19, 1973 at 7-8.

For years Teleprompter has been publicly representing in prospectuses that even if Respondents here are successful in their action "management of the Corporation believes that the effect on the Corporation will not be materially adverse." (E. 20.) This opinion has been reiterated in annual reports as recently as 1971 and 1972. See MPAA Br. Point V.

The Copyright Act was not designed to require that remorseless retribution be exacted in every case of infringement no matter what the circumstances. The history of copyright litigation illustrates the fact that copyright owners are not interested in destroying their prospective licensees.[73]

With respect to this litigation in particular, Teleprompter need not have any fear as to what the result of such remanded proceedings will be. In order to ensure that the copyright issues here are resolved without consideration of extraneous matters, Respondents are prepared to waive their rights to damages for past infringements and to request only that the injunctive relief originally prayed for be granted (A. 26a, 56a, 91a).

Nor need Teleprompter or the NCTA have any general concern as to what other copyright holders might do to enforce claims of damages for past infringing activities by cable television stations. The decision on this point rests solely with this Court. If the Court wishes to avoid "retroactively to impose copyright liability where it has never been acknowledged to exist before," 392 U. S. 401 n. 30, the principle is firmly entrenched that this Court is well within its powers to act prospectively only. *Great Northern Railway* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 363-366 (1932); see *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106-107 (1971); *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969); *Allen* v. *State Board of Elections*, 393 U. S. 544, 571-572 (1969); *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 422 (1964). See ASCAP Br. 22; MPAA Br. Point V. In

[73]In light of the fears expressed by Teleprompter and the NCTA, it is interesting to note that in the over 20 years of CATV activity, only two suits have been brought by copyright owners on account of cable television carriage of television signals simultaneously with their broadcast, this case and *Fortnightly*.

order to resolve the copyright issue on its merits, Respondents have no objection to the adoption of this principle here.[74]

CONCLUSION

In urging this Court to reverse the decision of the Court of Appeals below, Teleprompter and the NCTA are arguing that cable television systems, though for all intents and purposes functionally equivalent to broadcasters, should be judicially granted total copyright immunity.

Cable television is today big business. It is expanding and proliferating at a tremendous rate. Since 1960 when the *Fortnightly* case was brought, it has grown from a local service with some 650,000 subscribers to a national industry serving significantly more than 7,300,000 subscribers.[75] Consequently, any blanket copyright exemption for all cable stations (regardless of the functions they perform) will have enormous future consequences on all copyright holders, including producers, writers, publishers, broadcasters and others.

There is no reason why works of the mind in our society should be confiscated for the benefit of Teleprompter's expanding private enterprises. There is no public policy served by exempting *all* cable stations from royalty payments. Total exemptions from copyright liability is a matter solely for Congress. Congress has not exempted all cable television stations. Nor has it ever been seriously proposed that Congress exempt all cable television stations.

The argument for total exemption, if it were valid, could be made with respect to every form of communication,

---

[74]Other copyright holders are willing to take the same position taken by Respondents herein with respect to waiver of past damages. See, *e.g.*, ASCAP Br. 4, 22; MPAA Br. Point V.

[75]TELEVISION FACTBOOK, Services Vol. 43 (1973-1974 Ed.) at p. 84a. Teleprompter alone has some 900,000 subscribers. See *supra* at 5.

indeed by any copyright user. Thus, if it would be in the "public interest" to allow *all* cable television stations to escape payment, why not reverse the settled case law and exempt *all* broadcasting stations? Why not encourage the pirating of *all* books and phonograph records?

The answer is obvious. Reducing the incentives and rewards for creativity will in time prove disastrous to the public interest, rather than benefit the public. Such a result is exactly what the Constitution of the United States and the Copyright Act were designed to prevent.

For all the above reasons the judgment of the court below insofar as it reversed the decision of the District Court should be affirmed.

Respectfully submitted,

ASA D. SOKOLOW
SYDNEY M. KAYE
PHILIP MANDELKER
575 Madison Avenue
New York, New York 10022

HARRY R. OLSSON, JR.
51 West 52 Street
New York, New York 10019
Attorneys for Respondent Columbia Broadcasting System, Inc.

CHARLES H. MILLER
ROYAL E. BLAKEMAN
BERTRAND H. WEIDBERG
430 Park Avenue
New York, New York 10022
Attorneys for Respondent Calvada Productions

EUGENE Z. DUBOSE
ALFRED C. MORAN
120 Broadway
New York, New York 10005
Attorneys for Respondent
Jack Chertok Television, Inc.

SEYMOUR GRAUBARD
BERNARD BUCHHOLZ
345 Park Avenue
New York, New York 10022
Attorneys for Respondent
Dena Pictures, Incorporated

ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL
575 Madison Avenue
New York, New York 10022

MARSHALL, BRATTER, GREENE, ALLISON
& TUCKER
430 Park Avenue
New York, New York 10022

ALEXANDER & GREEN
120 Broadway
New York, New York 10005

GRAUBARD MOSKOVITZ MCGOLDRICK
DANNETT & HOROWITZ
345 Park Avenue
New York, New York 10022

Of Counsel

December 19, 1973